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**DEPARTMENT OF ENVIRONMENTAL PROTECTION
SITE REMEDIATION AND WASTE MANAGEMENT
DIVISION OF SOLID AND HAZARDOUS WASTE**

Solid Waste Activities by Rail Carriers

Adopted Amendments: N.J.A.C. 7:26-2.1, 3.2, 3.6, and N.J.A.C. 7:26H-1.6

New Rule: N.J.A.C. 7:26-2D

Proposed: October 6, 2003 at 35 N.J.R. 4405

Adopted: _____, by Bradley M. Campbell, Commissioner, Department of
Environmental Protection

Filed: _____, 2004 as R ____ **(with technical and substantive changes not
requiring additional public notice and comment) (See N.J.S.A. 1:30-6.3)**

Authority: N.J.S.A. 13:1E-1 et seq., 13:1B-3, 13:1D-1 et seq., 13:1D-125 et seq., 13:1E-9,
26:2C- et seq., 47:1A-1 et seq., 58:10-23.11, and 58:10A-1 et seq.

DEP Docket No: 21-03-09/334

Effective Date: On publication

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Expiration Date: _____

In 1995, Congress enacted the Interstate Commerce Commission Termination Act (Pub. L. 104-88, 109 Stat. 803), codified at 49 U.S.C. §§ 10101 et seq. (the “Act”). The Act grants jurisdiction over transportation by rail carriers that is only by railroad or by railroad and water when the transportation is under common control, management, or arrangement for a continuous carriage or shipment, to the Surface Transportation Board (STB). 49 U.S.C. 10501(a). (The STB is an independent Federal agency within the Department of Transportation that replaced the Federal Interstate Commerce Commission and that now performs all the functions that were previously performed by the ICC as of the effective date of the Act.) The Act also grants the STB exclusive jurisdiction over transportation by rail carriers, and “the construction, acquisition, operation, abandonment, or discontinuance of . . . tracks, or facilities, even if the tracks are located, or intended to be located entirely in one State.” 49 U.S.C. § 10501(b). Accordingly, the Act preempts State and local regulation over rail carrier construction and operations, but does not preempt the State’s important role in enforcing Federal, State and local environmental laws and regulations.

On October 6, 2003, the Department proposed amendments and new rules to the Solid Waste Management Rules (see 35 N.J.R. 4405) regarding solid waste activities by rail carriers in an effort to comport these rules with the Act. Pursuant to the proposal, rail carriers that transfer containerized or non-containerized solid waste to or from rail cars are exempt from the requirements of Subchapter 2, governing the disposal of nonhazardous solid waste, but are required to comply with the requirements of new Subchapter 2D, governing management of solid waste at rail carrier facilities. The proposal also exempts rail carriers that transfer solid waste to or from rail cars from the regulations that govern the authorization and operation of

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intermodal container facilities at N.J.A.C. 7:26-3.6. The comment period for this proposal closed on December 5, 2003. This adoption codifies these amendments and new rules.

Summary of Hearing Officer's Recommendations and Agency Response:

A public hearing concerning the proposed amendments and new rule was held on November 21, 2003 at the New Jersey Department of Environmental Protection, 401 East State Street, Trenton, New Jersey. Thomas Sherman, Assistant Director for Permitting Programs, Division of Solid and Hazardous Waste, served as the hearing officer. Five people presented oral testimony at the hearing.

Mr. Sherman recommended that the Department adopt the proposed amendments and new rule as described in this notice of adoption. The Department accepts the recommendation of Mr. Sherman.

The record of the public hearing (including the hearing officer's report) is available for inspection in accordance with applicable law by contacting:

New Jersey Department of Environmental Protection
Office of Legal Affairs
Attention: DEP Docket Number 21-03-09/334
401 East State Street
P.O. Box 402
Trenton, New Jersey 08625-0402

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Summary of Public Comments and Agency Responses:

The following people submitted written and/or oral comments on the proposed amendments and new rule. The number in parentheses after each comment corresponds to the number identifying commenters below:

1. Stuart Weiss
2. Tony Cavalier
3. Steve Changaris, Northeast Regional Manager, National Solid Waste Management Association
4. Julie Rodgers, Recycling Technology Center and Mazza & Sons
5. Derek Grasso, Manager of Regulatory Affairs, American Ref-fuel
6. David A. Gavrich, President and CEO, LB Railco
7. Maria Zannes, President, Integrated Waste Service Association
8. Jeffrey O. Moreno, Thompson Hine, on behalf of Metal Management Northeast, Inc.
9. James M. Rutala, Vice President, Atlantic County Utilities Authority
10. Dennis M. Toft, Wolff & Sampson, P.C., on behalf of the New York Susquehanna and Western Railroad.
11. Lisa R. Halperin, DeCotiis, FitzPatrick, Cole & Wisler, LLP, on behalf of the Essex County Utilities Authority, Hudson County Improvement Authority and Union County Utilities Authority
12. Holly Hermine Rosenberg
13. John K. Fiorilla, Watson, Stevens, Fiorilla, & Rutter LLP, on behalf of Morristown & Erie Railway, Inc.

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14. Bruce S. Katcher, Manko, Gold, Katcher & Fox, LLP, on behalf of CSX Transportation, Inc., Norfolk Southern Railway Company and Consolidated Rail Corporation

General Comments:

1. COMMENT: New York is currently constructing an assembly area on Staten Island for solid waste and is considering increasing or rebuilding the rail bridge from there to New Jersey. This would enable New York to ship waste into New Jersey to distribute it to wherever it may be going. At a time when there is a lot of waste from New York looking for a home, the Department's proposal will likely encourage an increase in the shipment of waste by rail through the State. Such an increase in rail traffic will affect a lot of towns, which will now be subject to significant odors and the associated health effects caused by the waste, which may be shipped in rail cars with nothing more than a canvas top. Therefore, the timing of this proposal is poor. Additionally, because of the potential for significant odor and other problems, the Department should not relinquish its control over rail carriers. Maintaining full permitting authority would be much easier than taking a rail carrier into court to try to stop them from shipping waste by rail.

(1)

RESPONSE: While the ICCTA preempts the Department's authority to permit a transfer facility owned and operated by a rail carrier and used for transferring shipments of solid waste to

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or from rail, it does not preempt the role State and local government agencies play in enforcing federal, state, and local environmental laws. With this adoption, the Department is not relinquishing control over rail carriers but instead adopting standards specifically applicable to rail carrier solid waste operations which will ensure protection of the health and safety of New Jersey residents and prevent degradation of the State's environment. (See new N.J.A.C. 7:26-2D.) Additionally, exempt rail carriers remain subject to compliance and other inspections conducted by Department enforcement personnel as well as delegated County Environmental Health Agency ("CEHA") personnel.

2. COMMENT: The commenter reported an incident involving a Lehigh Valley railroad train that passed by the commenter's development on July 20, 2003, emitting a foul odor which lasted well after the train left the area. The commenter believes the rotten egg odor given off by the train indicated that the train was transporting garbage. While the incident was reported to Assemblyman Peter J. Barnes, who said he would report the incident to the Department, and to Conrail, the commenter has heard nothing from the railroad or the Department. The commenter believes that the Department has not done its job with respect to the health and safety of New Jersey's citizens under the existing environmental rules and regulations. If the proposed new rules and regulations are adopted by the Department, the railroads will likely show little regard for the health and safety of people who live near the rail lines. (12)

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RESPONSE: See response to Comment 1. The Department notes also that it has jurisdiction to regulate facilities where waste is transferred to and from rail cars, but not to regulate rail cars while in transit.

3. COMMENT: Exempt solid waste facilities operated by rail carriers should be subject to equivalent environmental and public notice requirements as transfer stations which are not rail facilities. (5)

RESPONSE: The design and operational standards for rail carrier facilities are based upon those required for permitted facilities. Therefore, the environmental standards are similar. However, the only time the Department issues public notices regarding solid waste facilities is when a draft permit for a facility is issued for public comment. Since the ICCTA preempts the Department's authority to issue solid waste facility permits to solid waste facilities operated by rail carriers, public notice requirements otherwise applicable to draft solid waste facility permits likewise do not apply to solid waste facilities operated by rail carriers.

4. COMMENT: The commenter strongly supports the Department's proposal to exempt rail carriers from N.J.A.C. 7:26-2. The Department has struck the right balance in the proposed rule

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between Federal regulation of rail carriers and legitimate State environmental concerns. The proposed rules will also enhance New Jersey environmental objectives by facilitating a shift in millions of tons of Construction and Demolition (C&D) waste from local roads and highways to rail, reducing both traffic congestion and air pollution. The Department's proposed regulations need some clarification, and the Department should reconsider its insistence upon treating C&D waste the same as Municipal Solid Waste (MSW), by requiring that both transload operations take place in an enclosed building. (8)

RESPONSE: It is within the scope of the Department's police powers to require that the transfer of solid waste is conducted in a manner that is protective of human health and the environment. Although there are greater environmental concerns associated with the management of municipal solid waste than with construction and demolition waste, all waste processing operations present environmental risk. The transfer of waste from one vehicle or container to another presents opportunities for releases, particularly in high wind situations associated with outdoor operations. The Department is requiring all transfer station operations to take place within the confines of an enclosed building to ensure there are adequate odor, dust, leachate, stormwater and litter controls in place to reduce these risks.

Authorization/Scope of Preemption Issues

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5. COMMENT: Although the Department initiated its rulemaking to address the unforeseen problem of Federal preemption of regulations governing rail activities, the Department should extend the scope of its preemption, on policy grounds, to additional truck-to-rail transload operators that can demonstrate proper management, adequate facilities, and appropriate location, to efficiently perform truck-to-rail transload operations in compliance with N.J.A.C. 7:26-2D. If the proposed exemption is limited to rail carriers and their contractors, rail carriers will be in a position to restrict transload operations to a single preferred contractor. For example, CSX is already doing this by dealing exclusively with Waste Management, Inc. for the handling of intermodal containers of solid waste in Elizabeth, New Jersey. This allows railroads to restrict the supply of rail transload services and thereby control price. The end result is the removal of fewer trucks from State roads and highways. By applying the rules in N.J.A.C. 7:26-2D.1(d) to additional transload facilities, regardless of their affiliation with a rail carrier, the Department would further promote the rail transportation of construction and demolition (C&D) waste without any greater detriment to the environment. Removal of additional trucks from the highways would be a net environmental gain. (8)

RESPONSE: The exemption from permitting is limited only to rail carriers as defined in the ICCTA and does not involve transportation *to* rail carriers as the commenter proposes. See Hi Tech Trans, LLC v. NJDEP, -- F.3d --, 2004 WL 1945353, *10 (3d. Cir.). Based upon results of

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its implementation of these new rules, the Department may consider whether the exemption should be extended to other transload operators as well.

6. COMMENT: Rail carriers already have a permitting exemption granted to them by the Surface Transportation Board (STB), a Federal agency, and because of that exemption, New Jersey is proposing these regulations to address environmental, health, and safety aspects of these facilities. In other words, the Department is not granting rail carriers an exemption from permitting, they already have one. Is that correct? (2)

RESPONSE: The commenter's understanding that rail carriers are exempt from State permitting requirements as a result of preemption under Federal law, that is, the ICCTA, is correct.

7. COMMENT: The summary section of the proposal states that the Department's authority to permit a transfer facility owned and operated by a rail carrier and used for transferring shipments to or from rail may be partially pre-empted. It further states that the Department reserves the right to revoke these exemptions if the STB or reviewing court determines that solid waste facility design and permitting requirements are not partially pre-empted. After research and analysis of this issue, the commenter believes that there is no legal or reasonable policy rationale

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as to why New Jersey or any State should move forward at this time with this kind of rulemaking. Ceding any historical and currently enforced authority over the management of solid waste facilities to the STB is premature and will only serve to undermine the current and future progress made in improving how waste is managed. Amending and expanding these rules as proposed simply goes too far. There is no definitive legal holding that solid waste facilities are integrally related to the provision of interstate rail service, and, therefore, entitled to Federal preemption by the STB. Absent a court affirmed STB ruling to this effect, the commenter believes New Jersey should maintain that the State retains jurisdiction over rail-related solid waste facilities and that these facilities are subject to the same regulations as other solid waste facilities. This is the only path to better ensure profits, and to ensure the principles and goals of the integrated solid waste management system adopted by New Jersey and other jurisdictions.

(3)

RESPONSE: The Department has determined the ICCTA preempts the State's permitting authority over rail carriers as defined in the ICCTA. In order for the Department to establish environmentally protective standards for these facilities, the Department is adopting the regulations at this time. Additionally, the preemption issue has been litigated in NJDEP v. Hi Tech Trans, OAL Docket No. ESW 05815-03 (Sept 29, 2003), *aff'd*, No. A-29-03T3 (NJ Super Ct. App. Div. June 11, 2004) (per curiam) (holding that the ICCTA preempts the Department's

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permitting authority vis rail carriers but rejecting the dismissal of the Department's administrative order requiring Hi Tech to obtain a solid waste facility permit on the ground that Hi Tech is not a "rail carrier" within the meaning of the ICCTA). See also Hi Tech Trans LLC v. NJDEP, 2004 WL 1944323 (3d Cir. (N.J.) (dismissing complaint seeking declaration that state regulation of facility was preempted by federal law because facility was not a "rail carrier" within the meaning of the ICCTA).

8. COMMENT: The commenter supports the provisions of N.J.A.C. 7:26-2D.1(d) which included rail facilities for solid waste tipping, processing, sorting, and compaction within the scope of the preemption. Federal law preempts State regulation of rail transload facilities, with or without tipping. In addition, there are strong policy reasons why tipping should be within the scope of preemption. The most important consideration is the relative inability to examine a solid waste load to determine if there are any non-complying items contained in the load. Also, direct truck-to-rail transloads do not permit compaction of the solid waste, which then requires more rail cars to handle the same volume of compacted waste that could be handled by a single rail car. This alters the economics of the transload operation, by reducing the daily throughput volume, and the rail economics, by requiring more rail cars. The net effect is to reduce the number of trucks on the highways by shifting solid waste to rail. On a level playing field, transload facilities with tipping are more efficient and cost effective than direct truck-to-rail

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transload operations. By including transload facilities with tipping within the scope of the preemption, the Department has created a level playing field, which will encourage the more efficient transload with tipping operation. (8)

RESPONSE: The Department acknowledges the commenter's support of the regulations. Requirements on rail carriers that engage in tipping are codified at N.J.A.C. 7:26-2D.1(d).

9. COMMENT: The goal of the proposed new rule at N.J.A.C. 7:26-2D is to acknowledge the Federal exemption given to rail carriers by the enactment of the ICCTA which abolished the Interstate Commerce Commission and granted jurisdiction over transportation by rail to the STB. This goal is accomplished by N.J.A.C. 7:26-2.1(c) and by N.J.A.C. 7:26-2D, but these proposed changes go too far. (9)

RESPONSE: The commenter did not provide specifics regarding how it believes the proposed changes "go too far." However, the Department's intent is to acknowledge the Federal preemption of State permitting authority and to establish requirements specific to rail carriers that will be protective of human health and the environment.

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10. COMMENT: The Commenters commend the Department's summary of the purpose and intent of the ICCTA, as "preempting State and local regulation over railroad construction and operations, 49 U.S.C. § 10501(b), but [recognizing] the important role State and local governmental agencies must play in enforcing Federal, State and local environmental laws and regulations." Despite this recognition, the Commenters believe that the proposed regulations, to the extent they attempt to regulate operation of railroad facilities, including the manner and method used for loading solid waste into railcars, delve impermissibly far into the regulation of railroads that is reserved exclusively to the STB, as they attempt to regulate the operation of railroad facilities, including the manner and method and facilities used for the loading of solid waste into railcars. When it comes to the ICCTA and the jurisdiction of the STB, there is no such thing as "partial preemption" as suggested by the Department. The preemption of this subject by the Federal government is complete and exclusive. The Department has no legal authority to require a permit for the operation of such rail facilities; no "exemption" is required and, consequently, the Department has no reserved right to revoke a permit exemption that is not authorized in the first place. (10, 13, 14)

RESPONSE: The Department acknowledges that the ICCTA preempts the Department's authority to permit rail carriers as they are defined therein. However, the ICCTA does not preempt the role that State and local government agencies play in enforcing federal, state, and

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local environmental laws. With this adoption, the Department is adopting standards specifically applicable to rail carrier solid waste operations that will ensure protection of the health and safety of New Jersey residents and prevent degradation of the State's environment. (See new N.J.A.C. 7:26-2D.)

11. COMMENT: The Commenter respectfully suggests that in its attempt to provide certainty to its staff, the Department's focus on existing regulation of other facilities, such as transfer stations, has caused it to miss the essential point of preemption. Under the ICCTA, the Department has no legal authority to regulate railroad facilities or operations, except to the limited extent of reserved police powers. While other existing general regulations of the Department, such as those intended to protect the environment from releases of pollutants, are generally applicable to railroads, these specific proposed regulations, if adopted, are in themselves preempted as they are specifically aimed solely at railroad operations. To the extent that these regulations set forth the type of operations and facilities that the Department believes are sufficient to protect the environment, the information is helpful by alleviating uncertainty, but in so far as the regulations are little more than a re-writing of existing transfer station regulations that were not designed to accommodate the realities of rail facilities, rail equipment, the limitations of railroad property, or even accommodate rail facilities that currently operate without objection from the Department, they are clearly preempted. (10)

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The Commenter's experience is that rail facilities cannot fit within "cookie-cutter" description of a generic "transfer station" designed to perform various waste processing functions on all types of solid waste. Limitations on property, differences in operations and equipment and limitations or restrictions on the type of waste transported need to be acknowledged. Given the nature of the equipment involved, railroads do not enter into transportation arrangements for single truck load quantities of materials that arrive off the street as at transfer stations; rather, railroads enter into transportation arrangements with shippers, or into arrangements arranged on behalf of shippers by logistics providers, for significant quantities of materials. Rather than adopting a regulatory scheme that is authoritarian in nature, particularly where the exact line of permitted regulation is unclear and potentially driven by specific factual circumstances, this Commenter feels that while it may help for the Department to publish facility standards which it feels are clearly sufficient to protect the environment, the Department needs to be prepared to address, in a timely manner, other rail facilities that under the specific conditions applicable to each such facility, are sufficient to protect the environment. The Commenter has found that procedure to work well with other State and local regulatory authorities, and believes that no other approach is allowable under applicable law. As stated by New Jersey's Supreme Court, Village of Ridgefield Park v. New York, Susquehanna & Western Ry. Corp., 750 A.2d 57, 163 N.J. 446 "[A] certain degree of pragmatism on the part of the Village will be necessary in attempting to apply its relevant

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ordinances and regulations to the Railroad's facilities. Because of the nature of those facilities, literal compliance with all of the requirements of the Village's ordinances and regulations may be impractical, and may not be necessary to protect the public interest.” (10)

RESPONSE: It is within the State’s police powers to require rail carriers to comply with standards necessary to protect human health and environment. The facility design and operational standards in this adoption are general in nature and allow rail carriers flexibility to determine how to conduct their operations to comply with the standards.

12. COMMENT: The State has admitted that it cannot regulate the operations of rail carriers directly. With the proposal of these regulations, the State is now attempting to utilize a backdoor approach to regulation of the railroads by calling these regulations “environmental” regulations for which the State believes it is empowered to propose. The proposed “environmental” regulations are not truly environmental regulations. They are economic and protectionist regulations disguised as “environmental.” Preemption is measured not by what a State or local law is called, but by what the effect of the regulation will be upon the operation of rail transportation in interstate commerce. The effect of these regulations, if promulgated, is that they will directly interfere with interstate commerce and intrude upon the exclusive jurisdiction

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of the Congress of the United States and the STB jurisdiction over railroads and rail carriers.

(13)

RESPONSE: The transfer of waste between vehicles present environmental concerns. While the ICCTA preempts the State from permitting rail carrier operations, it does not preempt the State's police powers to protect human health and environment. The regulations are intended to ensure that the transfer of solid waste to and from rail cars is conducted in a manner that is protective of human health and the environment. Accordingly, adopting standards that protect the environment is not a "back door" approach.

13. COMMENT: The Summary states that the Department reserves the right to revoke a permit exemption "if an exempted rail carrier does not comply with the applicable solid waste regulations or district flow control requirements." This statement is inconsistent with the notion that the State is preempted from imposing permitting requirements. In light of the fundamental nature of preemption, the State is without authority to revoke an exemption where it is preempted from requiring a permit in the first instance. This does not mean that the State does not have other options to redress violations of regulatory requirements that are within the scope of its police powers - only that it may not revoke a permit exemption for a permit which it had no authority to require.

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RESPONSE: The Department agrees with the commenter. The quote cited was contained in an initial draft of the proposal that was shared with the public to receive comment prior to the official proposal. The quote cited was not published in the official proposal of October 6, 2003.

14. COMMENT: While the Commenters agree with the conceptual underpinnings of the permit exception, the Commenters would strike the balance somewhat differently by more narrowly defining the scope of the activities exempted to include those activities that are more clearly related to rail transportation, and at the same time applying a less extensive regulatory regime to rail transportation operations. This approach is justified because narrowing the scope of activities eligible for preemption would minimize the types of activities that are in need of environmental controls and thereby reduce the risk to be addressed under these regulations in the first instance.

In keeping with this approach, the Commenters support granting a permit exemption solely to the transfer of shipments of solid waste between rail cars and other modes of transportation, including limited, temporary staging on an impermeable surface or staging container incidental to and for the facilitation of such transfer, without any sorting, compaction (except in connection with normal loading activities) or other processing and associated tipping activities. Transfer

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activities are, in this form, considered to be traditional “transloading” operations, which are fundamentally a part of the uninterrupted transportation of waste materials in interstate commerce and fall within the scope of pre-empted rail transportation activities. While the Commenters understand that others might draw the line to include a broader range of activities, they feel that this approach is better able to distinguish the exempt transfer of solid waste to and from rail cars from other waste management activities, without excluding the possibility that a broader range of activities also may be, in certain circumstances, preempted rail transportation activities. The drawing of a more conservative line between exempt and non-exempt activities will limit the areas open to dispute, facilitate railroad operations and promote the use of rail as a meaningful alternative to truck transportation of freight in accordance with State transportation policy. It will also address the concerns of those who feel that the exemption, though mandated by Federal preemption, will afford the railroads an unfair competitive advantage as compared to non-rail carrier waste transfer operations.

Utilizing this approach, the following types of solid waste transfer operations would fall under the permit exemption for rail carriers:

- Transfer of solid waste from truck to railcar using mobile or stationary equipment that picks up the waste from the truck and places it directly into the railcar or onto an impermeable

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(e.g., concrete) surface or into a staging container in close proximity to the railcar to facilitate the safe and efficient loading of the railcar in an essentially continuous manner.

This transfer operation would not involve sorting or other processing and associated tipping activities or the placement of waste on the bare ground. It may involve some limited compaction as the material is placed in the railcar, however that type of activity should not be considered to exceed the scope of the permit exemption as it is directly related to the loading of the material into the railcar.

- Tipping of truckloads directly into railcars or onto an impermeable (e.g., concrete) surface or into a staging container in close proximity to the railcar to facilitate the safe and efficient loading of the railcar in an essentially continuous manner as described above.
- Transfer of liquid solid waste through piping or other direct connection (e.g., hose) from tank truck to tank car.
- Movement of waste material from truck to railcar via aboveground conveyer system.
- Transfer of sealed containers containing solid waste from truck trailer to rail flatcar (as discussed below, because this activity involves no waste handling whatsoever, but instead is

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simply the transloading of sealed containers, different considerations apply to whether and the extent to which any solid waste regulation is appropriate).

As these activities all involve the loading of a train from a truck (or vice versa) either in an enclosed environment, without placing the waste on the ground, or with limited temporary staging on an impermeable surface as may be incidental and necessary to facilitate safe and efficient loading operations, they unquestionably fall within the scope of activities covered by Federal preemption as well as being vital to the promotion of rail transport from a policy standpoint. In addition, the environmental risks associated with these activities are limited. (14)

RESPONSE: The commenter's listing of the types of transfer activities for the purpose of drawing a line between exempt and non-exempt activities does not coincide with the Department's position that all transfer activities conducted by rail carriers are preempted from State permitting authority. Therefore, the regulations are structured to accommodate all transfer station and intermodal container activities conducted by rail carriers. The regulations are intended to ensure that the transfer of solid waste to and from rail cars is conducted in a manner that is protective of human health and the environment and, therefore, are within the State's police powers.

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15. COMMENT: New Jersey should withdraw this proposal since it is inherently ultra vires and preempted by the ICCTA. Promulgating these regulations without change and without a sound legal basis will only lead to lengthy legal challenges and ultimately could discredit the State's ability to implement legitimate legal and policy concerns. (13)

RESPONSE: Since it is possible that the STB or the courts may in the future conclude in some cases that permitting of such facilities is not preempted, the Department, in that circumstance, would undertake rulemaking to repeal or modify the exemption established under these rules. The rail carrier exemption acknowledges the preemption of permitting authority as a result of the ICCTA.

16. COMMENT: Although the proposed regulations and consequently these comments are directed at solid waste facilities, preemption applies equally to hazardous waste, medical waste and recycling facility permits and approvals. (10, 14) Accordingly, the exemptions contained in these amended and proposed new rules should be similarly applied to these other permitting/approval programs. (14)

RESPONSE: The Department does not believe that case law interpreting the ICCTA and its

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preemption of the Department's authority over rail carriers is clear as it pertains to medical waste, hazardous waste, or recyclable materials. The Department is evaluating whether its regulations regarding these other noted waste types are preempted by the ICCTA, and therefore, cannot confirm the commenter's statement that the Federal preemption applies.

District Solid Waste Management Plans and Planning Process

17. COMMENT: New Jersey has one of the country's most comprehensive solid waste management statutes. The State's solid waste management system involves multiple levels of authority, oversight and participation by various State agencies, counties and their implementing authorities and agencies, municipalities, citizens, businesses and environmental groups, and recycling service providers. These stakeholders, who have participated in good faith over the years to help plan and develop the State's solid waste infrastructure, will be negatively impacted should the proposed rules be adopted. For example, a solid waste facility that seeks to undertake a project to develop or expand its operations must seek inclusion in its county's solid waste plan. The process for plan inclusion involves extensive planning, environmental controls and work with the community in which the facility is located (the "host" community). Host communities work closely with the facility and the county in determining the suitability of the site and the project. Upon approval of the project by the county, a plan amendment is issued which, in turn, is reviewed by the Department. The Department then either accepts, rejects, or approves the

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project pending modification (if warranted). A permit is then issued as appropriate. The proposed rules effectively, prematurely and unnecessarily allow a rail carrier proposing a similar project to bypass this planning process. This not only leaves the host communities exposed, but also undermines the credibility and the efficacy of the county solid waste planning process. Moreover, these regulations, if adopted, will work against any municipality or county that tries to assert land use control authority before the STB or in the courts over a rail company which endeavors to site a waste facility within its borders. The rail company will invariably site the Department's adopted regulations, which will be construed as formal State acceptance of the exemption. The rail carrier will use these regulations against the local government's interest in stopping the proposed and locally unacceptable land use by the rail carrier. (3)

RESPONSE: While the Department agrees with the commenter that the State's solid waste management system has been successful, it has been determined that the ICCTA preempts State authority to permit solid waste operations by rail carriers. Therefore, rail carrier solid waste facilities are exempted from the need to receive county approval, or be included in the county's district solid waste management plan. The Department has tried to mitigate any impact to the host community and statewide planning efforts by establishing environmental standards and reporting requirements that these exempt facilities must meet. These standards ensure that the health of communities located near these rail carrier facilities and the quality of the environment

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continues to be protected.

18. COMMENT: First, it should be made clear that railroad facilities do not have to be included in the district solid waste management plan of the county in which the facility is located as a precondition to facility operations. Secondly, if enforced, this provision would allow a solid waste district to exclude the railroad from participating in transporting solid waste materials which are from counties which are involved in flow control. While the Commenter does not intend to address this issue at this time in these comments, it seems clear that such a result would violate the Interstate Commerce clause as interpreted in C&A Carbone v. Town of Clarkstown, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed. 2d 399 (1994) and Atlantic Coast Demolition and Recycling v. Bd. of Chosen Freeholders of Atlantic County, 112 F.3d 652 (1997). (10)

RESPONSE: The commenter is correct that rail carrier facilities do not have to be included in the district solid waste management plan of the county in which the facility is located as a precondition of facility operation because the ICCTA preempted any local approval requirements for rail carriers. However, pursuant to N.J.A.C. 7:26-2.1(c)3, the exemption does not apply to solid waste transporters that transport waste to rail carrier facilities. Such transportation remains subject to all applicable regulations, including district solid waste flow control provisions. Therefore, transporters collecting waste from counties with waste flow must

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deliver the waste to the county-designated facilities.

19. COMMENT: The proposed regulations clearly provide that solid waste facilities operated by rail carriers still must comply with other provisions of the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq. (SWMA) and its implementing regulations. See for example, proposed regulation N.J.A.C. 7:26-2.1(c)3. County authorities are concerned however, that those operators not too familiar with the solid waste management scheme of this State may side step the solid waste management district's role in solid waste management planning. The solid waste rules and regulations provide that a solid waste facility must first be included in the solid waste management plan of the county in which it is located prior to commencing operations. N.J.A.C. 7:26-2.4 states that the Department shall not begin the processing of a solid waste facility permit until "the facility has been included in the applicable solid waste management plan." See also Regional Recycling, Inc. v. State Department of Environmental Protection, 256 N.J. Super. 94 (App. Div. 1991), wherein in recognition of the substantial public interest involved in solid waste management planning, the court held that a solid waste facility must first obtain inclusion in the relevant County Plan prior to the Department's issuance of a permit. In addition to the information provided to the Department under the proposed regulations at N.J.A.C. 7:26-2D.1(b) and (c), therefore, the regulations should also require proof from the rail carrier that they have obtained inclusion in its county's solid waste management plan. (11)

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RESPONSE: The Department does not agree with the comment. The ICCTA preempted the requirement that rail carriers receive county approval, including that the facilities be approved in their respective district solid waste management plan, to operate. It is for this reason that the adopted rule at N.J.A.C. 7:26-2.1(c)1 exempts rail carriers from the permitting requirements of Subchapter 2.

20. COMMENT: The draft regulations specify that the exemption does not apply to a solid waste transporter transporting waste to a rail carrier and that such a transporter remains subject to district plan solid waste flow control provisions. The commenters do not oppose that approach for present purposes; however, it should be made clear that the exempted transload facility should not have to be included in the district solid waste management plan of the county in which the facility is located as a precondition to facility operations. Like State permitting requirements, this requirement imposes a pre-clearance requirement on the operation of the facility that is preempted by Federal law. (14)

RESPONSE: The ICCTA preempts the requirement that rail carriers receive county approval, including that the facilities be approved in their respective district solid waste management plan, to operate.

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A-901 Disclosure Requirements

21. COMMENT: While the Commenters commend the Department for appropriately eliminating the requirement to submit a disclosure statement pursuant to N.J.A.C. 7:26-16.3, the Commenters believe that this exemption does not go far enough in recognizing the appropriate scope of Federally preempted State pre-clearance requirements. (10, 14) The Commenters believe that it is also necessary to eliminate the requirement for rail carriers to obtain facility or transporter licenses or to pay licensing fees associated with such licenses. A license is no different than a permit from the standpoint of being a preempted pre-condition to rail carrier operations. (14) It is also necessary that all requirements for facility or transporter licenses, equipment registration and any related fees be eliminated. (10)

RESPONSE: N.J.A.C. 7:26-2.1(c)1 and 3.6(a)1 exempt rail carriers from the need to submit permit applications or obtain facility permits or approvals. Therefore, the Department will not require permits or approvals or assess permit application review fees for rail carrier facilities. N.J.A.C. 7:26-3.2(a) states, "No person shall engage or continue to engage in the transportation of solid waste without first obtaining an approved registration statement from the Department..." The Department agrees with the commenter that an approved registration statement is a form of

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approval that is preempted by the ICCTA. Therefore, concurrent with this adoption, the Department is proposing amendments to N.J.A.C. 7:26-3 that will exempt rail carriers from the need to obtain approved transporter registration statements and pay transporter related fees. Please refer to the concurrent proposal for the regulatory text under consideration that appears elsewhere in this issue of the New Jersey Register.

22. COMMENT: The summary portion of the proposal states that rail carriers are exempt from the A-901 disclosure law. On page 4407 of the proposal, however, it states that the Department believes that the Act may *partially* preempt the Department's authority to require these rail carriers to obtain a license under the A-901 program. Does this mean that the Department doesn't really know if the entire A-901 disclosure law applies to exempt rail carriers? (2)

RESPONSE: Since the A-901 program only applies to those facilities and transporters seeking a permit or license and the ICCTA preempts rail carriers from the need to obtain such permits or licenses, rail carriers are not subject to the A-901 program. The Department's concurrent proposal, appearing elsewhere in this issue of the New Jersey Register, includes amendments to the rule to codify this exemption.

23. COMMENT: New Jersey has a strong history underpinning the A-901 process, requiring

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careful review of facility operators by the attorney generals' office. If rail carriers can be exempt from this process, then other companies should be exempt from the A-901 process as well. (3, 4)

RESPONSE: The A-901 process is designed to check for individuals with unethical past practices or criminal ties and backgrounds operating in the waste industry in New Jersey. As a result of the ICCTA, the State is preempted from issuing A-901 licenses to rail carriers. The ICCTA does not preempt the Department from issuing A-901 licenses to non-rail carriers. Thus, in order to protect the public's interest, the Department will maintain the A-901 disclosure process for non-rail carriers.

24. COMMENT: N.J.A.C. 7:26-2.1(c)2 exempts rail carriers from the A-901 requirement. It is ambiguous as to whether it applies to persons who perform transloading services on behalf of a rail carrier. This ambiguity can be resolved by the language suggested in Comment 36 for N.J.A.C. 7:26-2.1(c)1. Because the A-901 permitting requirement is not an appropriate health and safety regulation, and it can be used to frustrate or defeat federally regulated rail activity, including transload operations, it is preempted. See Cities of Auburn and Kent, WA – Pet. For Declaratory Order – Burlington Northern R.R. Co. – Stampede Pass Lion, STB Finance Docket No. 33200, (served July 2, 1997), aff'd sub nom., City of Auburn v. U.S., 154 F. 3d 1025 (9th

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Cir. 1998). (8)

RESPONSE: The exemption from A-901 licensing applies to rail carriers or those persons conducting activities on their behalf, including transloading facilities. Note that the rail carrier must own the facility and maintain liability for all solid waste processed at the facility.

25. COMMENT: The State of New Jersey presently does not regulate the licensing or shipments of waste that originates from out of the State and travels through the State for ultimate disposal. Haulers and corporations from other than New Jersey are not required to register their vehicles with the Department or comply with background investigations under A-901 requirements if the waste is simply transported through New Jersey. Since this mechanism already exists for truck transportation, the following language should be added at N.J.A.C. 7:26-2D.1(c), to allow for similar treatment for rail transportation of solid waste through New Jersey:

“Solid waste vehicles which originate from outside of New Jersey and unload containerized or non-containerized solid waste commodities shall not be required to register their vehicles with the State of New Jersey Department of Environmental Protection or be required to submit to corporate disclosure information and receive operating approval as required by the New Jersey background investigation process known as A-901, if all waste submitted for rail

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transportation is disposed of out of the State of New Jersey. Appropriate bills of lading shall provide adequate verification of this out of State disposal process.” (13)

RESPONSE: The Department does not agree with the commenter’s suggestion. If waste that is transported into New Jersey is destined to be transferred at an exempt rail carrier facility in the State, the transporter transporting that waste remains subject to all applicable regulation including the registration and A-901 provisions of N.J.A.C. 7:26-2.1(c)3. Regardless of the state of origin of a solid waste vehicle, such vehicles must be registered and decaled if they are delivering waste to a solid waste facility in New Jersey. Note that the Department is proposing an exemption from the A-901 requirements for rail carriers in a proposal that appears elsewhere in this issue of the Register.

Social Impact Statement

26. COMMENT: The Commenters commend the Department for recognizing the public benefit of reducing the use of fossil fuels, decreasing highway congestion, improving road safety and decreasing the impact on publicly funded road maintenance and operations caused by truck traffic, as described in the Social Impact paragraph of the Summary. Like the Department, the Commenters are optimistic that the Department’s proposed exemption for rail carriers will act as an incentive for rail carriers such as themselves to expand their handling of solid waste and help

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to create an atmosphere of competition that will result in lower costs to the public for solid waste collection and disposal. (14)

RESPONSE: The Department acknowledges the commenter's support of the regulations.

Economic Impact Statement

27. COMMENT: The Economic Impact portion of the proposal states that rail carriers engaged in the transfer of solid waste to or from rail cars are exempt from having to obtain a permit from the department "*prior to commencing construction*" or operation of a solid waste facility. Does this mean that the rail carrier can notify the Department that it intends to open at a certain location and then start operating before it commences construction of the building? In other words, can the rail carrier operate an open air facility prior to construction of a building? (2)

Will existing rail operations and future rail operations, if they're required to construct a building, be allowed to operate while the building is under construction or will they have to wait until building construction is complete? (4)

RESPONSE: N.J.A.C. 7:26-2D.1(d)1 requires any rail carrier that engages in any form of solid waste tipping, processing, sorting or compaction, or the removal of solid waste from a container to transfer to another container or vehicle, to conduct these activities within the confines of an

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enclosed building. There are no provisions that would allow for open air transfer operations under any set of circumstances. It is possible that a rail carrier may be able to operate within a building under construction, provided the requirements of N.J.A.C. 7:26-2D.1(d) are met.

28. COMMENT: The Department's economic impact statement really only applies to rail carriers, because existing solid waste facilities must still pay fees, such as application fees, modification fees, and inspection fees. Additionally, the economic impact statement makes a statement that unless existing non-rail transfer stations become more efficient, they may have to close down. Private industry is already very efficient because if they're not, they go out of business. The Department will now have two types of facilities handling essentially the same types of solid waste but under different sets of regulations with different economic impacts. The Department should, therefore, review its regulations on non-rail transfer stations to see if reduced regulations may be warranted. Additionally, the Department should make sure that facilities which ship by rail continue to have a viable alternative means of transportation, should the rail option fold. (2)

RESPONSE: The operational and design standards by which rail carriers must operate are based upon those required for permitted facilities. Although the regulations specifying the requirements for permitted facilities and rail carriers are located in separate sections of the

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regulations, the requirements are similar. If for some reason an exempt facility's rail transfer operation were to cease to operate by rail, the exemption would no longer apply and the facility would be required to obtain a solid waste permit in order to operate.

Lastly, under the Solid Waste Utility Control Act, the Department monitors both the availability of solid waste collection services and competition in the solid waste collection industry. Such oversight of the industry ensures that safe, adequate and proper collection services are provided and available. This Department oversight, however, does not relieve a company of its obligation to have contingency plans in place identifying alternate transportation options should their primary mode of transportation be unavailable.

39. COMMENT: The economic impact statement states that less air pollution will be generated because trains emit less air pollution. While it is true that trains emit less air pollution, whatever air pollution savings are realized on that end will be negated because the State continues to have solid waste flow. In other words, waste which could be trucked to a local facility for disposal, is being directed via county waste flow regulations, to more distant disposal sites. A review of recent and pending plan amendments, which the Department approves, would show that solid waste is being trucked all over the State, particularly in North Jersey. (2)

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RESPONSE: Currently, there are a limited number of counties in the State that have opted to direct waste to specific disposal locations. The majority of counties have free market systems that allow waste to be shipped to any authorized facility. In the limited number of counties that implement waste flow, the Department does not consider the approved waste disposal sites to be located excessively distant from the points of waste generation.

30. COMMENT: The economic impact statement states that there will be an overall positive economic impact to rail carriers which in turn will promote competition in the solid waste industry. This statement is deceptively misleading, is unfair and unacceptable, and amounts to no less than differential treatment of solid waste service providers by the Department. The reality is that all solid waste service providers, not just railroads, would experience a cost savings if exempted from the Department's permitting regulations and from the preparation and submission of facility applications and associated fees. The Commenter knows of no reason why solid waste facilities should receive special regulatory consideration and relief from other solid waste facilities simply by virtue of ownership by a railroad company. (3)

RESPONSE: The Department acknowledges that rail carrier solid waste facilities will experience a cost savings as compared to non-exempt facilities as a result of not having to pay permit application fees. The solid waste regulations require all non-exempt facilities to submit

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permit applications which are reviewed by the Department to ensure the facilities are properly designed and operated to comply with the solid waste regulations prior to a permit being issued. Applicants are assessed a fee to cover permit application review costs. Since the ICCTA preempted the State's authority to issue permits to rail carrier facilities, the Department may not require rail carriers to submit permit applications and consequently cannot assess permit application review fees to these facilities.

31. COMMENT: Exempting rail carrier facilities from solid waste permitting gives these rail-related facilities an unfair economic advantage. For example, the commenter's company spent close to \$200,000 to get its air pollution permits plus the cost of equipment necessary to comply with the permit. If the State is concerned about air pollution, it should treat all facilities equally.

(4)

RESPONSE: Both rail carrier transfer facilities and non-rail carrier transfer facilities must be designed to control dust and migrating odors. See N.J.A.C. 7:26-2D.1(d)7 and 8 and N.J.A.C. 7:26-2B.5(b)7, respectively. Accordingly, both, rail and non-rail facilities must meet the same air quality design standards.

32. COMMENT: The economic impacts discussed by this summary are not created by the

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proposed regulations. Instead, they arise, if at all, by virtue of the Federal preemption of State and local regulation over railroad operations established by the ICCTA and are implicit in the Federal regulatory scheme. Therefore, contrary to the concerns of those entities that contend that the Department is placing non-rail carriers at a competitive disadvantage through the proposed regulations, the proposed regulations merely recognize the state of pre-existing Federal law and do not themselves create any advantage for rail carriers. Moreover, because non-rail carriers have historically and will continue to benefit from the Federal and State governments' maintenance and improvement of public roads and highways, whereas the rail carriers are financially responsible for the maintenance and improvement of their own infrastructure, the Commenters see no net competitive advantage from the recognition of Federal preemption of State and local regulation over railroad operations. (14)

RESPONSE: When determining the economic impact of amendments and new rules, the Department compares the costs of complying with the regulations as they currently exist with the cost to comply with the proposed amendments and new rules, if applicable. Clearly, the cost to comply with the proposed amendments and new rule would be significantly less for rail carriers. With respect to the commenter's statement that there is no net competitive advantage to rail carriers over non-rail carriers, the Department notes that prior to the Federal preemption under the ICCTA, rail carriers maintained their own infrastructure while non-rail carriers benefited

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from Federal and State governments' maintenance. Additionally, , rail carriers are no longer required to pay either solid waste permitting fees or A-901 disclosure fees, which can be substantial. Non-rail carriers must continue to pay these fees. Therefore, the Department believes that rail carriers may have a competitive advantage over non-rail carriers since their overall operating costs have been reduced. Such reduced costs may enable them to charge less for their transportation services than non-rail carriers.

Environmental Impact Statement

33. COMMENT: Although the Department has addressed a number of environmental issues in its proposal, there are other environmental issues which have not been addressed. Two additional issues are tipping area size and waste consolidation. Some of these rail-related tipping areas are very small and consist of little more than a concrete pad with shipping containers serving as a wall. Unlike non-rail transfer stations, these rail-related facilities have no limit placed on the amount of waste they can accept. It is likely there will not be sufficient space to tip. Additionally, unlike non-rail transfer stations, these rail related facilities will be able to consolidate and commingle waste unconditionally. (2)

RESPONSE: The regulations do not specify a minimum tipping floor size and do not place any limits on the quantity of waste that may be accepted. However, N.J.A.C. 7:26-2D.1(d) 1 requires

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all waste tipping, storage and processing to take place within the confines of an enclosed building. Therefore, any rail carrier consolidation activities must take place within a building as is required of permitted facilities. Accordingly, it is not possible for a rail carrier facility to accept more waste than it is able to tip inside its building and still comply with N.J.A.C. 7:26-2D1(d)1.

34. COMMENT: The Department states in its proposal that any environmental impacts from solid waste facilities operated by rail carriers should be minimal because these facilities must be managed in accordance with the same operational requirements for permitted solid waste transfer facilities. This conclusion is premature, poorly reasoned and not grounded in a sound understanding of the STB permitting for rail facility. The STB process is radically different, is much less rigorous and reflects STB environmental standards, not New Jersey's more rigorous standards, for rail carrier facility impacts. When this issue of a deferential review comes up, it will be after New Jersey has already discarded its best card to protect New Jersey citizens, counties and communities by ceding the issue that waste facilities owned by rail carrier have Federal STB preemption. Moreover, once deemed preempted by New Jersey, it does not necessarily follow that the STB will cede jurisdiction over operation requirements of these facilities to Department standards. STB case law suggests that the STB does not hold its permittee rail carriers to many requirements of host jurisdictions. (3)

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RESPONSE: The Department is adopting environmental rules for rail carriers that are based upon the standards required of permitted non-rail carrier facilities. Therefore, environmental impacts should be minimal, provided that rail carriers comply with the required standards. The Department's enforcement program will periodically inspect the rail carrier facilities to ensure the facilities are being operated in accordance with the standards.

Definition of Rail Carrier

35. COMMENT: The Summary portion of the Department's proposal makes the following statement: "The term 'rail carrier' means a person as defined in 49 U.S.C. §10102(5) that provides common carrier railroad transportation and has been issued a certificate or license, . . . *and holds out to the general public that the operations at the facility for which the exemption is applicable are being conducted by it or on its behalf as part of its rail transportation services.*"

What do the words "on its behalf" mean as far as the rail line is concerned? Does it mean that some entity other than the rail carrier can make an agreement with the rail carrier to operate or does it have to be the railroad itself? (2) The wording of this definition raises some concern that the definition may be misinterpreted to apply only to a rail carrier itself when another entity conducts those activities on the rail carrier's behalf, and not to encompass the other entity.

As the Department is aware, transfer operations are almost always performed through

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contractors, agents and affiliates of a rail carrier. If the exemption is not defined to include parties such as agents, contractors or affiliates acting on behalf of a rail carrier, it will not achieve the salutary policy objectives described above without a major and extremely costly restructuring of the way that railroads do business, which would unreasonably burden their transportation operations and, in and of itself, would be preempted as unduly interfering with rail carrier operations.

RESPONSE: A rail carrier may contract with another entity to operate a facility on its behalf, but the rail carrier must be the owner of the facility and maintain responsibility and liability for solid waste processed by its facility.

36. COMMENT: The regulatory text at N.J.A.C. 7:26-2.1(c)1 does not clearly indicate who or what is exempted. For example, does the exemption apply to the rail carrier, the transload facility, or the transload operation? The first sentence refers to “rail carriers,” but the second sentence defines “rail carrier” in terms of “the operations at the facility for which the exemption . . . is applicable. . . ,” which gives the impression that the exemption applies to the transload operation and/or the facility. The first sentence, which applies the exemption to a “rail carrier,” captures the correct scope of the preemption, but that scope subsequently is confused by the second sentence. The following revised language would clarify this:

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“For the purpose of this subchapter, the term “rail carrier” shall mean a person as defined in 49 U.S.C. §10102(5) who, as part of its railroad transportation service, holds itself out to the general public to provide rail transloading services that are performed by it or on its behalf.”

N.J.A.C. 7:26-2.1(c)1 is also ambiguous as to whether the exemption applies to entities who perform transloading services on behalf of a rail carrier, although this result is implied by the phrase, “conducted by it *or on its behalf* as part of its rail transportation services,” at the conclusion of the second sentence. This result also is required by the decision of the former Interstate Commerce Commission (ICC) in Assoc. of P&C Dock Longshoremen v. The Pittsburgh and Conneaut Dock Co., 8 I.C.C. 2d 280 (1992), which construed the statutory definitions of “rail carrier,” “railroad,” and “transportation” to include the ship-to-rail transloading operations of the P&C Dock Co. This conclusion was underpinned by four Supreme Court decisions dating back to 1911. Id. at 290, note 21. The Department should add the following sentence after the second sentence to clarify the scope of this exemption:

“The term “rail carrier” shall include persons who perform transload services on the rail carrier’s behalf.”

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The proposed revisions to the definition of “rail carrier” would clarify that the exemption extends to persons who perform transload operations on behalf of a line-haul railroad, such as Conrail, Norfolk Southern, or CSX. (8)

RESPONSE: The definition of the term “rail carrier” in N.J.A.C. 7:26-2.1(c) is clear and correctly relates the exemption to the types of facilities that are being exempted under the proposal. In addition, as noted in response to Comment 35, the words “on its behalf” recognizes the fact that the rail carrier may engage the services of a contractor or agent to conduct the operations at an exempt facility; as the rail carrier is exempt from the permitting requirements of the regulations, the suggested clarification is unnecessary. However, the definition of “rail carrier” will be amended, as discussed below in response to Comment 37, to reflect the fact that several rail carriers commenced operations prior to the licensing provisions of the ICCTA.

37. COMMENT: Although the Department’s the definition of “rail carrier” has reasonably accurately parroted the words of 49 U.S.C. § 10102(5) and interpreted by the STB in Hi Tech Trans, LLC, STB Finance Docket No. 34192, the commenter contends the wording of this definition in this context is subject to misinterpretation. Railroads handle many commodities that are transloaded, and there are myriad commercial arrangements that may exist as

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transloading operations may be conducted by contractors, agents and affiliates of a rail carrier and shipping arrangements may be arranged through logistics providers. The Commenter does not believe that the STB intended in Hi Tech to say that signage at a rail facility directing trucks to a solid waste transload site refers to the railroad rather than, for instance, the name of the shipper or shippers who have made arrangements with the railroad for the movement of the commodity. Such would be a useless elevation in importance of form over function, at a level of detail that far exceeds the STB's usual exercise of authority. Clearly, the intent in Hi Tech is that such wording had to do with what the railroad represents to the shipping public, not the public at large. Additionally, the Commenter believes that many, if not most, rail carriers were never issued certificates or licenses. Their operations were instead sanctioned by decision of the STB or its predecessor agency. It is the granting of jurisdiction to the STB, not the holding of a "certificate or license" which governs.

For these reasons, the Commenter proposes the following clarifications:

For the purpose of this subchapter, the term "rail carrier" shall mean a person as defined in 49 U.S.C. § 10102(5), including contractors, agents and affiliates thereof, undertaking operations at a facility for which the exemption under this subchapter is applicable, that: (1) provides common carrier railroad transportation; (2) is subject to the jurisdiction of the United States STB or any successor agency; and (3) conducts

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operations at the facility for which the exemption under this subchapter is applicable as part of rail transportation services. (10)

RESPONSE: The proposed definition of “rail carrier” correctly sets forth the entity that is covered by the preemption in 49 U.S.C. § 10501(b), and the suggested clarification would improperly broaden the definition to include parties that are not rail carriers and do not fall within the statutory definition of that term in 49 U.S.C. § 10102(5). The definition of “rail carrier,” however, provides that the activities of contractors, agents and affiliates of rail carriers would be included within the exemption as long as those activities were being conducted on behalf of the rail carrier as part of its rail transportation services. Therefore, signage at exempt rail facilities could be handled by these entities rather than the railroad. Lastly, the commenter is correct that several rail carriers commenced rail carrier operations prior to the licensing provisions of the ICCTA. Accordingly, the definition of “rail carrier” will be modified to reflect this.

38. COMMENT: The scope and applicability of N.J.A.C. 7:26-2.1 is acceptable as proposed. The definition of “rail carrier” must be amended to more accurately reflect the nature of the entities operating these types of facilities as follows:

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For the purpose of this subchapter, the term “rail carrier” shall mean a person as defined in 49 U.S.C. §10102(5) *including their contractors, subcontractors, agents or other contractually affiliated with the rail carrier at a facility for which an exemption applies and at least one party that provides common carrier railroad transportation as approved and has been issued a certificate or license, pursuant to 49 W.S.C. §§ 10901 or 10902, by the United States . . . that transfers containerized or non-containerized solid waste to or from rail cars is not exempt from regulation pursuant to the Solid Waste management Act, and shall be subject to the provisions of N.J.A.C. 7:26-2D agrees to provide certain information to the State of New Jersey pertaining to solid waste facilities as delineated at N.J.A.C. 7:26-2D.*

N.J.A.C. 7:26-2D.1 should also be modified to revise the definition of “rail carrier” as noted above. Additionally, sections (c) and (d) should be eliminated since the State has no authority to regulate the operations of rail carriers as it relates to the interstate shipment of commodities such as waste. The State has no authority to regulate how the operations of these commodities are handled by the railroads including: storage, handling, inspections, violations, reporting requirements, processing, building requirements, building designs, onsite operating procedures, etc. The State may have legitimate concerns and authority to regulate matters associated with air (dust) and water pollution, but these issues must be regulated at the borders of the facilities, not

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by attempting to regulate how the railroad operates within the facility. These border controls already exist and are presently enforced by the State.

N.J.A.C. 7:26-3.6(a)1 should also be modified to revise the definition of “rail carrier” as noted above. Additionally, N.J.A.C. 7:26-3.6(a)1 should be eliminated since the State has no authority to regulate the operations of rail carriers as they relate to interstate shipment of commodities such as waste..

Lastly, N.J.A.C. 7:26H-1.6(f) should be modified to revise the definition of “rail carrier” as noted above. (13)

RESPONSE: The definition of “rail carrier” at both N.J.A.C. 7:26-2(D).1 and 3.6(a)1 correctly set forth the entity that is covered by the preemption in 49 U.S.C. § 10501(b), and the suggested clarification would improperly broaden the definition to include parties that are not rail carriers and do not fall within the statutory definition of that term in 49 U.S.C. § 10102(5). The Department’s police powers enable it to regulate all aspects of rail carrier operations at a New Jersey facility that would impact human health and the environment, including those that pertain to waste storage, handling, processing, etc. In these rules, the Department is not regulating the interstate shipment of waste and therefore declines to delete N.J.A.C. 7:26-3.6(a)1.

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39. COMMENT: The Department's intent to accurately incorporate the definition of "rail carrier" as defined in 49 U.S.C. § 10102(5) and interpreted by the STB in Hi Tech Trans, LLC, STB Finance Docket No. 34192, is clear. Nevertheless, the wording of this definition raises some concern that the definition may be misinterpreted to apply only to a rail carrier itself when another entity conducts those activities on the rail carrier's behalf, and not to encompass the other entity.

As the Department is aware, transfer operations are almost always performed through contractors, agents and affiliates of a rail carrier. If the exemption is not defined to include parties such as agents, contractors or affiliates acting on behalf of a rail carrier, it will not achieve the salutary policy objectives described above without a major and extremely costly restructuring of the way that railroads do business, which would unreasonably burden their transportation operations and, in and of itself, would be preempted as unduly interfering with rail carrier operations.

Moreover, the stated requirement to have "been issued a certificate or license, pursuant to 49 U.S.C. §§ 10901 or 10902, by the United States Surface Transportation Board (or its predecessor agency)" would exclude the major railroads servicing New Jersey (including the Commenters), as these entities commenced rail carrier operations prior to the enactment of the certificate and

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license requirements of 49 U.S.C. §§ 10901 or 10902, and might undermine the Department's intention to distinguish between legitimate rail carriers and others. For example, in lieu of the issuance of a certificate or license, Commenters' operations and status as rail carriers are instead sanctioned either explicitly or implicitly by STB decision (see, e.g., CSX Corporation, et. al. X [sic] Control X [sic] Conrail, Inc., et. al., 3 STB. 196 (1998) (Decision No. 89)), other action of the STB or its predecessor agencies, or pursuant to alternative sections of the ICCTA or predecessor authority (see, e.g., 49 U.S.C. § 11323). In addition, pursuant to 49 U.S.C. §10105, the STB may exempt certain rail carrier activities from the requirement to obtain a certificate or license pursuant to 49 U.S.C. § 10901 and 10902, including rail carriers whose activities may otherwise fall within the scope of the Department's proposed rule.

For these reasons, the Commenters propose the following modifications:

For the purpose of this subchapter, the term "rail carrier" shall mean a person as defined in 49 U.S.C. § 10102(5), including contractors, agents and affiliates thereof, undertaking operations at a facility for which the exemption under this subchapter is applicable, that:

(1) provides common carrier railroad transportation; (2) has been approved pursuant to 49 U.S.C. §§ 10901 or 10902 by the United States Surface Transportation Board (or its predecessor agency) or otherwise has been recognized as a rail carrier by such agency;

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and (3) holds out to the general public that the operations at the facility for which the exemption under this subchapter is applicable are being conducted as part of rail transportation services.

(14)

RESPONSE: The Department recognizes that certain types of railroad transportation services, such as transload and transfer operations, are at times conducted by third parties. Accordingly, the definition of “rail carrier” provides that the activities of contractors, agents and affiliates of rail carriers would be included within the exemption as long as those activities were being conducted on behalf of the rail carrier as part of its rail transportation services. The definition proposed in the comment would broaden the scope of the exemption to any facility that provides transportation services as defined by 49 U.S.C. § 10101(9), whether or not those activities were performed by or on behalf of a rail carrier; as the preemption in 49 U.S.C. § 10501(b) relates only to activities of rail carriers, and not to those of third parties, that suggestion is overly broad. As noted above, the proposed definition of “rail carrier” will be modified to reflect the fact that several rail carriers commenced operations prior to the licensing provisions of the ICCTA.

40. COMMENT: Must a rail carrier have its own employees operating these sites? Must it be

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railroad equipment used at these sites and must the check for the tipping fee be made out to the rail carrier? (2)

RESPONSE: A rail carrier may have either its own employees and equipment or contract with another entity to operate the facility on its behalf. The rules do not address or govern to whom checks for tipping fees should be addressed as this is a matter to be determined by the rail carrier.

41. COMMENT: To ensure that all New Jersey rail transload operations are performed by bonafide rail carriers, the Department's regulations should specify that only railroad employees receiving protections and benefits under the Railroad Retirement Act be certified to operate in those rail transload operations. Certified rail carriers can pay in excess of 35% of its employees' gross salaries into Tier 1 and 2 Railroad Retirement accounts and health benefits. Such a requirement, therefore, would serve as a very effective screening tool to separate out legitimate railroad operations from those that are only "fronts." (6)

RESPONSE: Rail carriers may have either their own employees or contract with another entity to operate a facility on its behalf. Therefore, the regulations will not be revised to specify the type of employee required to operate a facility. The issue as to whether the contractor must

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provide protections and benefits under the Railroad Retirement Act and similar legislation is a matter within the jurisdiction of the Railroad Retirement Board and is not controlled by these regulations.

N.J.A.C. 7:26-2

42. COMMENT: The first sentence of this subsection, i.e., “This subchapter does not apply to a rail carrier that transfers containerized or non-containerized solid waste to or from railcars,” should be modified to reflect a narrowed scope of the exemption. The Commenters propose that the sentence be changed to read, “This subchapter does not apply to a rail carrier that engages in any of the following activities:” which would be followed by a recitation of the five bulleted activities that would be exempt from permitting as follows:

- Transfer of solid waste from truck to railcar using mobile or stationary equipment that picks up the waste from the truck and places it directly into the railcar or onto an impermeable (e.g., concrete) surface or into a staging container in close proximity to the railcar to facilitate the safe and efficient loading of the railcar in an essentially continuous manner. This transfer operation would not involve sorting or other processing and associated tipping activities or the placement of waste on the bare ground. It may involve some limited compaction as the material is placed in the railcar, however

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that type of activity should not be considered to exceed the scope of the permit exemption as it is directly related to the loading of the material into the railcar.

- Tipping of truckloads directly into railcars or onto an impermeable (e.g., concrete) surface or into a staging container in close proximity to the railcar to facilitate the safe and efficient loading of the railcar in an essentially continuous manner as described above.
- Transfer of liquid solid waste through piping or other direct connection (e.g., hose) from tank truck to tank car.
- Movement of waste material from truck to railcar via aboveground conveyer system.
- Transfer of sealed containers containing solid waste from truck trailer to rail flatcar.

Additionally, the Commenter has several concerns with the third sentence of this subsection (beginning “However, a rail carrier . . .”). First, it should be modified to be consistent with our comment on the first sentence concerning the scope of activities that would be subject to the exemption. Second, the Commenters feel that it is confusing to State that a rail carrier to which

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subchapter 2 does not apply is nevertheless “not exempt from regulation pursuant to the Solid Waste Management Act” when rail carriers are at least partially exempt from the SWMA.

Moreover, the Commenters do not agree that all of these sections would or should apply to otherwise exempt activities and have objected to certain of these requirements on Federal preemption grounds and otherwise. The Commenters propose the following language for the third sentence: “However, a rail carrier that engages in any of the activities described above is not exempt to the extent of and shall be subject to the provisions of N.J.A.C. 7:26-2D.” (14)

RESPONSE: As the permit requirements of these regulations may be preempted by 49 U.S.C. § 10501(b) with respect to any rail transportation activities that might be conducted by rail carriers, the Department does not believe it would be appropriate to attempt to limit or restrict the nature of those services. Additionally, as noted in the response to **Comment 14**, the Department is taking the position that all transfer activities conducted by rail carriers are preempted from State permitting authority. Finally, the Department believes that the regulations accurately reflect the scope of rail carrier exemption from the Solid Waste Management Act.

N.J.A.C. 7:26D

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43. COMMENT: Consistent with Comment 14 concerning the narrow scope of exempt activities, the heading for this section should be revised to refer to “Requirements On Rail Carriers that Engage in Activities Described in N.J.A.C. 7:26-2.1(c)1.”

RESPONSE: Since the Department is not listing the types of transfer activities that are exempt from permitting as requested in Comment 14 , the heading for the referenced section will not be revised

N.J.A.C. 7:26D.1(b)

44. COMMENT: Consistent with Comment 14 concerning the narrow scope of exempt activities, the beginning of this section should be modified to read, “A rail carrier that engages in any of the activities described in N.J.A.C. 7:26C-2.1(c)1, shall provide the Division of Solid and Hazardous Waste with the following information” (14)

RESPONSE: Since the Department is not listing the types of transfer activities that are exempt from permitting as requested in Comment 14, there is no need to revise the heading for the referenced section.

45. COMMENT: The regulatory requirements for rail carriers that transfer solid waste should also specifically include the requirements of 49 C.F.R. Part 1105, procedures for implementation

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of environmental laws. These regulations are designed to ensure adequate review of several Federal environmental statutes, and to encourage State and local review of activities that could impact the environment. Under that section, applicants must prepare a formal Environmental Assessment (EA) or Environmental Impact Statement (EIS) for any actions that exceed certain thresholds. The most likely threshold in these cases would be an increase in truck traffic of more than 10 percent or an increase of more than 50 vehicles per day on any affected road segment. Even if those thresholds are not exceeded, the applicant is required to prepare and submit an environmental report and to distribute this report to several local and Federal agencies, including the State environmental protection agency, political leaders in the area, the United States Environmental Protection Agency, and any other appropriate agencies. This environmental report must contain a wide variety of environmental impact information, including a discussion of the thresholds discussed above that could lead to subsequent preparation of an EIS or EA. It also requires the solicitation and consideration of input from a variety of stakeholders. In addition, it requires the preparation of a Historic Report and submittal to the appropriate State historic preservation officers. If a proposed action affects land or water uses within a State coastal zone, then it requires special notice to the State's coastal zone manager, and assurance that the action is consistent with the State's coastal zone management plan.

To integrate these requirements into the State's proposed regulation, N.J.A.C. 7:26D-2.1(b)

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could be modified to read as follows:

(b) A rail carrier that transfers containerized or non-containerized solid waste to or from rail cars shall comply with the requirements of 49 C.F.R. Part 1105 – Procedures for Implementation of Environmental Laws. For submittal of the Environmental Report, Environmental Assessment, and/or Environmental Impact Statement to the State Department of Environmental Protection, the following address shall be used:

....

This section of the regulations could also be revised to include specific addresses for other State agencies that are cited in 40 C.F.R. § 1105.7(b), including the Coastal Zone Management Agency or the State’s historic preservation office. (5, 7)

RESPONSE: Rail carriers must comply with all applicable Federal and State regulations regarding their operations, including any requirement to prepare and submit environmental assessments and impact statements. It is not necessary to duplicate the Federal requirement in the Department’s regulations. Moreover, the establishment by a rail carrier of a transfer station or transload site is not an action for which an Environmental Report is normally required under 49 C.F.R. Part 1105.

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N.J.A.C. 7:26-2D.1(c)

46. COMMENT: The transfer of solid waste in sealed containers (hereinafter sometimes referred to as intermodal container or “IC” transfer) is part of the uninterrupted transportation of waste materials in interstate commerce, the permitting (or other approval) of which should be fully exempted. Because no waste handling activities take place, the handling of these containers is factually indistinguishable from any other intermodal container handled every day by rail carriers and no operational requirements are necessary or appropriate under the State’s police power.

A broad exemption for IC transfer activities is also justified because what little environmental risk may exist can be addressed by regulations applicable to non-rail solid waste transporters and processors without encumbering railroad transportation. Under the proposed regulations, a processor that fills and transports sealed intermodal containers before delivery to an exempt facility is subject to regulation pursuant to the SWMA. Therefore, by regulating that processor and the motor carrier non-rail transporter, the State is able to regulate the physical condition of sealed solid waste containers in order to minimize the likelihood that solid waste could spill, leak or otherwise be released. Additionally, by requiring that the containers be sealed, the risk of

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odor, dust, disease vectors or other concerns that form the basis for the draft operating regulations regarding IC transfer activities (N.J.A.C. 7:26-2D.1(c)2) can be fully addressed.

Therefore, the Commenters contend that the enumerated standards under 7:26-2D.1(c)2 should be deleted. To the extent that the Department determines that it will not delete those standards, the Commenters incorporate below their comments on the corresponding standards at 7:26-2D.1(d).

In addition to the above, a broad exemption for IC transfer activities is consistent with State transportation policy which aims at fostering the use of rail transportation as a means to minimize the adverse environmental and other impacts of motor carrier traffic on the State's highways.

Without limiting the foregoing, the Commenters maintain that the introductory language of N.J.A.C. 7:26-2D.1(c) is vague and ambiguous in that it fails to precisely identify the facilities to which it applies. As drafted, it could be read to limit the exemption for handling sealed containers to rail carriers who only engage in the transfer of sealed containers, as opposed to those who may also engage in the transfer of waste that is not in sealed containers anywhere within the State. We do not believe this is what the Department intended. Rail carriers may have a number of solid waste facilities in the State of New Jersey, some of which may involve

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only sealed containers of solid waste, some of which may involve transloading or other handling of solid waste that is not in sealed containers and some of which may involve a combination of activities. A rail carrier should be able to qualify for regulation under 7:26-2D.1(c) at any of its facilities that engage only in the transfer of sealed containers of solid waste, even if that rail carrier conducts transloading or other handling operations involving unsealed containers at another of its facilities.

In addition, as presently drafted it is unclear whether the permit exemption applies only to transfer activities at a facility owned by the same rail carrier that is engaged in the transloading activities. If it was the Department's intent to limit the exemption to transfers by the rail carrier in the rail carrier's own facility, we do not see the basis for the requirement. If the rail carrier's activity (loading or unloading a railcar) is preempted, it should not be necessary that the activity take place on the property of the rail carrier. Of equal importance, in practice, transloading by a rail carrier may take place on property owned by an entity other than the rail carrier. Therefore conformance with the limitation as proposed would necessitate a costly and inefficient restructuring of ownership relationships throughout the industry. Instead, the Commenters propose that any requirement that the rail facility be owned by the rail carrier engaging in the preempted activity be eliminated.

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Finally, the Commenters believe that the inclusion of the phrase “and that does not engage in any form of solid waste tipping (such as onto the floor of a building or other structure), processing, sorting or compaction, or the removal of solid waste from a container to transfer to another container or vehicle” is redundant in light of the limitation that transportation at the facility be “exclusively in the form of sealed containers.” Removal of this language, with the suggested addition of the phrase “at that facility” at the end of this provision would greatly clarify that the provision applies only to a facility at which sealed container transportation is carried out, without changing the narrow focus of the provision.

For these reasons, the Commenters propose the following language:

A rail carrier that engages in the transportation of solid waste at a facility within the State of New Jersey exclusively in the form of sealed containers of solid waste, shall comply with the following requirements at that facility.

(14)

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RESPONSE: The regulations at N.J.A.C. 7:26-3.6(a) already partially exempt intermodal container facilities that transfer solid waste to and from rail cars. Further exemptions from N.J.A.C. 7:26-2D.1 or other provisions are not warranted. These additional standards are designed to ensure that operation of such a facility is conducted in a manner that is protective of human health and the environment.

The introductory language of N.J.A.C. 7:26-2D.1(c) identifies to which facilities this subsection applies and is therefore unambiguous. This section applies to a rail carrier (defined in N.J.A.C. 7:26-2.1(c)1) that meets the following criteria: (1) engages in the transportation of solid waste; (2) at a facility owned by that rail carrier; (3) within New Jersey; (4) exclusively in the form of sealed containers of solid waste; and (5) that does not engage in any form of tipping or other activities enumerated in the rule. Moreover, subsection 2.1(c) applies only to those rail carriers who engage in the transfer of sealed containers; rail carriers that engage in tipping are governed by subsection 2.1(d).

The regulations apply to each individual facility. Operating a transfer station facility regulated pursuant to N.J.A.C. 7:26-2D.1(d) (pertaining to rail carriers that engaged in any form of solid waste tipping) does not preclude the same rail carrier from also operating an intermodal container facility regulated pursuant to N.J.A.C. 7:26-2D.1(c). Ownership in these regulations

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applies to ownership of the facility operations; the rail carrier is not also required to own the real estate upon which the operation is conducted.

The phrase in N.J.A.C. 7:26-2D.1(c) indicating that this subsection applies only to a facility “that does not engage in any form of solid waste tipping, processing, sorting or compaction, or the removal of waste from a container to transfer to another container or vehicle,” will remain in the regulations for clarification regarding what activities are not regulated pursuant to this section of the regulations, but rather are subject to N.J.A.C. 7:26-2D.1(d).

47. COMMENT: Rail transload operations should be transload operations, only. No separation, materials recovery, composting, or processing of any type should occur within a rail transload site. Those activities can and should be performed at fully permitted solid waste transfer stations. The operational regulations for rail transload sites, such as no material allowed to be placed on the ground and dust controls regardless of whether or not the transloading takes place in a building, will go a long way to assuring that railroad transload sites perform narrowly defined services. (6)

RESPONSE: The ICCTA preempts State authority to permit all types of transfer-station-type activities. Accordingly, the Department is preempted from issuing permits to rail transload

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operations as well as at facilities that process waste by separation, material recovery, etc.

However, the Department is not precluded from enforcing environmentally protective regulations with regard to these facilities. The Department disagrees that transloading activities, whether conducted inside or outside a building should be permissible under the exemption if waste is not placed on the ground and if dust controls are employed because outdoor transfer operations are not protective of human health and the environment in all situations. For example, the transfer of waste from one vehicle to another presents opportunities for releases, particularly in windy conditions. Additionally, dust control measures that are necessarily employed in outdoor operations such as wetting lightweight materials with water to prevent them from being windblown are often impractical in freezing weather conditions that exist in the winter months in New Jersey.

48. COMMENT: The acceptance and handling of hazardous waste or regulated medical waste at rail facilities that manage only sealed containers should be specifically prohibited at N.J.A.C. 7:26-2D.1(c). Such a standard is proposed at N.J.A.C. 7:26-2D.1(d)20 for rail facilities that engage in solid waste tipping. There is no similar prohibition, however, in N.J.A.C. 7:26-2D.1(c). The standard could be added as a new N.J.A.C. 7:26-2D.1(c)2xvi. (5, 7)

RESPONSE: N.J.A.C. 7:26-2D.1(d)20 prohibits rail carrier facilities that engage in any sort of

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solid waste tipping, processing, sorting or compaction, or the removal of waste from one container to transfer to another container or vehicle, from accepting or in any manner handling hazardous waste or regulated medical waste except if done in compliance with applicable requirements for such activities. This regulation has been placed in the section regarding transfer stations to prevent hazards associated with processing and the possibility of mixing these types of wastes together. Intermodal container facilities that choose to manage intermodal containers of these wastes may do so in accordance with applicable regulations such as the ten-day transfer facility regulations for hazardous waste found at N.J.A.C. 7:26G-7.4.

49. COMMENT: A hazardous waste inspection plan is needed in the standards for rail facilities that manage only sealed containers. New language similar to that proposed at Comment 100 for N.J.A.C. 7:26-2D.1(d)²⁷ could be incorporated into N.J.A.C. 7:26-2D.1(c), perhaps as a new section at N.J.A.C. 7:26-2D.1(c)^{2xvii}. Although inspection of sealed containers poses unique challenges, the suggested language does allow for “other steps” to ensure that incoming waste does not include hazardous waste. A process could be derived with assistance and approval of the Department, perhaps involving random opening and sampling of containers. Without such a regulatory inspection program, literally anything could eventually be transferred through sealed container rail facilities, either by mistake or by design. (5, 7)

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RESPONSE: N.J.A.C. 7:26-3.6(a)2 specifically prohibits intermodal container facilities from accepting or handling hazardous and regulated medical wastes, subjects facilities to violations for failure to comply with this requirement, and requires that these facilities comply with N.J.A.C. 7:26-2D.1(c), pertaining to rail facilities that transport solid waste exclusively in sealed containers. Therefore, rail carriers should take reasonable inspection measures of their own accord to ensure that unauthorized waste types are not processed at their facilities short of measures that require the unsealing of these containers.

50. COMMENT: N.J.A.C. 7:26-2.1(c) that exempts rail carriers in the business of transportation of solid waste from the Department's permitting process gives rail carriers a huge advantage over solid waste facilities currently permitted by the Department. This exemption undermines the SWMA, the Solid Waste Planning Regulations (N.J.A.C. 7:26-6), and replaces them with the discretion of the STB. The exemption relieves rail carriers from many regulations, including but not limited to: Host Community Benefit Tax and Department Fees and regulations as set forth in N.J.A.C. 7:26-4. All solid waste facilities currently permitted by the Department would greatly benefit from the same exemptions that are being given to rail carriers that engage in solid waste activities. The Department's proposed regulations take what was a "level" playing field and slant it greatly in favor of solid waste facilities and activities by rail carriers. The proposed new rule will increase competition within the solid waste industry, but at what cost? How will this

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new rule affect currently permitted solid waste facilities? What are the environmental impacts of such a change? (9)

RESPONSE: The ICCTA preempted State authority to permit solid waste transfer operations by rail carriers. As discussed in response to Comment 18, rail carrier facilities are not required to be included within applicable district solid waste management plans, and, therefore, are not subject to payment of host community benefits. As such, the Department is not relinquishing control over rail carriers by this regulatory action, but is instead establishing environmental standards for rail carriers. The new rules will not affect the design, operational, record keeping or reporting requirements for currently permitted solid waste facilities. Since the standards for rail carriers are based upon those required for permitted, non-rail facilities, the environmental impacts should be minimal. Lastly, increased competition within the solid waste industry is expected to have a positive impact on the general public by lowering prices. Such competition may affect the overall composition of the solid waste transfer industry, favoring rail facilities over non-rail transfer stations. As noted above, however, such increase in rail facilities will have minimal or no negative impact to public health and the environment since these facilities must be designed and operated in accordance with the same environmentally protective standards with which non-rail facilities must comply.

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51. COMMENT: The transfer of solid waste in sealed containers is part of the uninterrupted transportation of waste materials in interstate commerce, the permitting (or other approval) of which is fully preempted. While the Department's broad environmental standards may apply to rail facilities where intermodal containers are loaded onto rail cars, there is no justification for regulations that are any different than those applicable to facilities that handle other commodities, particularly since it is likely that the facilities are one and the same.

Therefore, the Commenter submits that the enumerated standards under 7:26-2D.1(c)2 should be deleted. To the extent that the Department determines that it will not delete those standards, the Commenter incorporates by reference its comments on the corresponding standards at 7:26-2D.1(d). (10)

RESPONSE: While the ICCTA preempted State authority to permit solid waste transfer operations, it does not preempt the State from exercising its police powers to protect human health and the environment. Managing solid waste presents a variety of environmental and human health concerns that the new regulations are designed to minimize. Therefore, the standards will remain in the regulations.

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52. COMMENT: While we understand the intent of the Department's placing limitations on the amount of time solid waste may remain at a facility, the requirements of rail transportation may require longer periods of time than proposed. As long as the Department's generally applicable performance-based environmental regulations are complied with (i.e. odor, stormwater quality, etc.), the Department's attempt to set limits or requirements for the operation of a rail facility is preempted. This limitation is clearly required by the Ridgefield Park decision referenced in Comment 11 above. (10)

RESPONSE: The longer waste is stored, the greater the potential for odor and vector problems to arise. The time limitations that waste may remain at a facility, namely 72 hours for putrescible waste, 10 days for non-putrescible waste and up to 180 days for ID72 liquid waste stored in sealed containers, are reasonable time limits for waste storage to minimize public health and environmental concerns. These are the maximum limits that waste may be held at non-rail carrier intermodal container facilities, pursuant to the solid waste regulations.

53. COMMENT: The transfer of solid waste in sealed containers is fully exempted on the basis that no waste handling activities take place and the transfer of these containers is factually indistinguishable from any other intermodal container handled daily by rail carriers. (See N.J.A.C. 7:26-2D.1(c)2i.) (14)

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RESPONSE: Although the activities involved in transloading intermodal containers of waste is analogous to transloading intermodal containers of other commodities, the management of waste presents significantly different environmental concerns, for example odors, that the proposed regulations are designed to address.

54. COMMENT: Solid waste is typically contained in sealed containers at all times at IC facilities, except when sampling liquid waste. This requirement (i.e., sealed containerization) would be a necessary prerequisite to eligibility for the proposed exemption in the first instance. (See N.J.A.C. 7:26-2D.1(c)2ii.) (14).

RESPONSE: The Department agrees with the commenter that sealed containerization is a necessary prerequisite to eligibility for the proposed exemption. Additionally, the practice of keeping containers sealed at all times except when sampling liquid waste is consistent with the Department's regulations which allow containers holding ID 72 liquid solid waste to be opened briefly for the purpose of sampling the liquid, provided that the container is resealed immediately after sampling.

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55. COMMENT: The requirements at N.J.A.C. 7:26-2D.1(c)2i and ii to keep all containers sealed and comply with limitations upon storage time, should ensure the risk of odors is minimal and compliance with N.J.A.C. 7:27-5.2(a) should be sufficient to protect against any foreseeable air pollution harms and therefore satisfy any police power concerns that may arise from odor or other air pollution issues. Therefore, the requirements of N.J.A.C. 7:27-5.2(a), to the extent otherwise applicable, need not be incorporated here. (See N.J.A.C. 7:26-2D.1(c)2iii.) (14)

RESPONSE: N.J.A.C. 7:26-2D.1(c)2iii will remain in the regulations to clarify that the operation shall not result in the migration of odors outside the confines of the rail carrier's property or the emission, except by locomotive or locomotive engine, of air contaminants in violation of N.J.A.C. 7:27-5.2(a).

56. COMMENT: The prohibition against queuing and staging of solid waste vehicles on a public roadway does not appear to implicate any significant environmental concerns related to rail transloading activities (10, 14) and would impose an unreasonable and unrelated (to transloading) administrative burden on such activities by requiring the policing of off-site activities of shippers delivering waste for rail transport and this requirement is therefore federally preempted. (14) It would instead impose on the railroad an obligation that presumably currently resides with the State or local authority which regulates highway traffic. (10) To the

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extent that the Department has the authority to regulate highway traffic and vehicle operations, such efforts such are addressed to the operator of the vehicles, not the railroad. (See N.J.A.C. 7:26-2D.1(c)2vii and viii.) (10)

Further, a rail carrier's federally-mandated common carrier obligations would preclude it from turning away these vehicles. See 49 U.S.C. §11101. To the extent a valid police power concern may exist, that concern can and should be addressed in a less burdensome manner, e.g., by imposing a prohibition against queuing and staging on a public roadway on the solid waste vehicles themselves, rather than on the rail transloading facility. (See N.J.A.C. 7:26-2D.1(c)2vii.)

Moreover, traffic flow issues internal to the transloading facility are no different for waste-containing vehicles than for non-waste containing vehicles. Imposition of substantial regulatory burdens would, in either event, impermissibly interfere with interstate commerce. Therefore, this requirement should be eliminated. (See N.J.A.C. 7:26-2D.1(c)2viii.) (14)

RESPONSE: Although traffic backups may not present a direct environmental threat, trucks waiting to enter a facility by queuing on public roadways outside a facility gate present a human health threat by creating traffic hazards for motorists. N.J.A.C. 7:26-2D.1(c)2vii prohibits

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queuing and staging of solid waste vehicles on any public roadway, and N.J.A.C. 7:26-

2D.1(c)2viii requires that solid waste vehicles on access roads servicing the facility must be queued and staged so as to prevent traffic backups and related traffic hazards. It is reasonable that rail carriers are responsible for ensuring that their operations do not endanger the public traveling on public roadways outside the facility. If a rail carrier determines conditions at its facility may result in trucks backing up onto public roadways, action must be taken to alleviate such a situation from occurring to protect the public interest. Lastly, the commenter does not justify how preventing traffic hazards would interfere with interstate commerce.

57. COMMENT: The Commenter recognizes the State's concern and anticipates that security measures would be implemented in any event that would prevent the harms contemplated by N.J.A.C. 7:26-2D.1(c)2iv. (14)

RESPONSE: The Department acknowledges receipt of the comment.

58. COMMENT: Maintaining an adequate water supply and fire-fighting equipment to extinguish any and all types of fires and to keep fire-fighting procedures, including telephone numbers of local fire, police, ambulance and hospital facilities posted within the facility, is good safety practice and would be undertaken in any event. (See N.J.A.C. 7:26-2D.1(c)2v. and

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2D.9(d)9.) (14) The taking of precautions when handling incompatible wastes or mixtures of incompatible wastes to prevent violent reactions, fire, explosion, toxic mists, fumes, gases, etc., and prevent damage to equipment or the facility and threats to human health and the environment may be appropriate police power regulations as required by N.J.A.C. 7:26-2D.1(d)19vi. However, any requirement to document the same would be preempted by ICCTA and Federal recordkeeping requirements. (14)

RESPONSE: Any time incompatible materials are being managed, precautions need to be taken to ensure violent reactions, explosions, toxic mist formation, fumes, gases, etc. do not occur. N.J.A.C. 7:26-2D.1(d)19vi requires rail carriers to document these precautions to help ensure that this important step is taken and to provide the Department with the authority to investigate that proper precautions are being taken.

59. COMMENT: Controlling insects, other arthropods and rodents at a rail carrier facility, while a good health and safety practice, is unnecessary to the extent that waste is handled exclusively in sealed containers. (See N.J.A.C. 7:26-2D.1(c)2vi.) (14)

RESPONSE: The Department agrees to remove this requirement based upon the comment and since the existing corresponding regulations for intermodal non-rail carrier container facilities at

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N.J.A.C. 7:26-3.6 do not specify that a program in compliance with the Pesticide Control Code, N.J.A.C. 7:30 be implemented.

60. COMMENT: N.J.A.C. 7:26-2D.1(c)2ix. fails to recognize the preemption of State and local noise ordinances as applied to rail facilities. To the extent that the Department fails to recognize this, we suggest that the reference be to “....any legally applicable regulation promulgated pursuant to the State Noise Control Act....” (10)

RESPONSE: The Department acknowledges that there is presently no State noise regulation that is applicable to rail carriers. See the Noise Control rules at N.J.A.C. 7:29-1.4(a)10, which specifically excepts “surface carriers engaged in commerce by railroad” from these rules. Rail carriers must comply, however, with the Federal noise emissions standards. Accordingly, the Department does not believe it is necessary to amend N.J.A.C. 7:26-2D.1(c)2ix as the commenter suggests.

61. COMMENT: The Commenters commend the Department for acknowledging the preemption of the Noise Control Regulations, N.J.A.C. 7:29, as to facilities and appurtenances owned or operated by rail carriers; however, the Department’s requirement that rail carriers shall at all times comply with “any applicable regulation promulgated pursuant to the State Noise Control

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Act, N. J. S. A. 13:1G-1 et seq.,” is directly inconsistent with that preemption. Courts and the STB have uniformly held that State and local regulatory action with regard to noise is federally preempted by the ICCTA. See Rushing v. Kansas City Southern Ry., 194 F. Supp.2d 493 (S.D. Miss. 2001) (to the extent the homeowner plaintiffs sought to use State law to control noise production by regulating the manner in which the railroad operated its switch yard, the State law was preempted by the ICCTA); Guckenberg v. Wisconsin Central Ltd., 178 F.Supp2d 954 (E.D. Wis. 2001) (summary judgment granted because nuisance claim was preempted by the ICCTA); Village of Ridgefield Park v. New York Susquehanna & Western Ry. Corp., 163 N.J. 446 (N. J. 2000) (Village’s common law nuisance claim in connection with noise pollution is preempted by the ICCTA); Joint Petition for Declaratory Order - Boston & Main Corp. and Town of Ayer, MA, STB Finance Docket No. 33971, 2001 STB LEXIS 435 (April 30, 2001) (Town of Ayer’s noisome trade ordinance is preempted by the ICCTA).

Most recently, the United States District Court for the Northern District of Ohio decided the matter of Norfolk Southern Ry. Co. v. City of Maple Heights, Ohio, Case No. 1:02CV1468 (N.D. Ohio 2003). The court in Maple Heights found that enforcement of a city’s noise ordinance, despite being permissible pursuant to the Federal Noise Control Act, was not a valid exercise of police power and was therefore expressly preempted by the ICCTA. In light of this

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precedent, the Commenters propose deletion of the requirement to comply with regulations under the State Noise Control Act. (See N.J.A.C. 7:26-2D.1(c)2ix.) (14)

RESPONSE: The wording of this requirement enables the Department to adopt a State noise standard applicable to rail carriers in the future without having to amend the solid waste regulations. Therefore, N.J.A.C. 7:26-2D.1(c)2ix will remain in the regulations.

62. COMMENT: The requirement to admit only registered solid waste vehicles displaying a registration number and solid waste decal implicates any environmental concerns with respect to the operation of a transloading facility. This requirement may be appropriate where wastes are being handled, e.g., at a landfill or transfer station; however, transloading of sealed containers does not involve such waste handling activity and by its nature would be unreasonably burdened by this requirement. (10, 14) N.J.A.C. 7:26-2D.1(c)2x. places an unreasonable burden on the railroad by requiring the railroad to participate in the enforcement of the Department's and/or the solid waste districts' regulation of shippers of solid waste, which would be in contravention of the railroad's common carrier obligations. (10) In addition, limitations on access to rail transportation are inconsistent with federally-mandated common carrier obligations that are imposed on rail carriers. 49 U.S.C. §11101. Rail carriers should not be put in the role of monitoring and Interstate Commerce Commission Termination Act (Pub. L. 104-88, 109 Stat.

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803) codified at 49 U.S.C. §§ 10101, et seq. (the “Act”), policing solid waste registration numbers and decals to substantiate compliance with N.J.A.C. 7:26-2D.1(c)2x, (d)16, and N.J.A.C. 7:26-3. Imposition of this policing obligation on transportation by rail carriers is an undue interference with the rail transportation process and is preempted. (See N.J.A.C. 7:26-2D.1(c)2x.) (14) This requirement would extend the Department’s regulation of shippers and transporters of New Jersey solid waste to other interstate transporters, clearly in contravention of the interstate commerce clause. (10)

RESPONSE: All vehicles transporting solid waste in New Jersey, unless exempt pursuant to N.J.A.C. 7:26-3.3, are required to be registered with the Division of Solid and Hazardous Waste and must display the appropriate registration number and decal. A preemption from permitting for rail carriers should not create a mechanism for transporters to circumvent State solid waste vehicle registration requirements. Moreover, the comment has not provided the Department with an explanation of how enforcement of the Department’s and/or the solid waste districts’ regulations of shippers of solid waste would be in contravention of the railroad’s common carrier obligations. If rail carriers fail to conduct a simple check to ensure that only trucks having appropriate solid waste decals enter the facility, then that failure to check could contribute to tacitly encouraging an illegal activity. Additionally, it is the duty of the owner/operator of a solid waste facility to keep its property safe and to warn transporters on the property of known

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dangers. An individual operating an unregistered solid waste vehicle may lack the knowledge regarding proper disposal of solid waste and when invited onto the facility's property increase the risk of environmental harm. Therefore, enforcing a ban on unregistered solid waste vehicles would be a matter of public safety for the facility's personnel to handle.

63. COMMENT: While the Commenter has no general objection to inspection of rail facilities by the Department at N.J.A.C. 7:26-2D.1(c)2xi, any such inspection must occur at reasonable times and be in compliance with all safety regulations promulgated by the owner of the facility. The Federal Railroad Administration requires its inspectors to comply with these standards, and no less should be expected from the Department. The Department's access to the facility, and to records, must be limited to the Department's role in regard to environmental laws and regulations, not to "all Federal or State statutes." (10)

RESPONSE: The Department or its designated representatives would normally inspect facilities during operating hours unless extenuating circumstances warrant a special investigation. The inspectors would only check the facility records to ascertain compliance or noncompliance with Federal or state environmental regulations and statutes.

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64. COMMENT: The obligation to allow the Department access to the facility is overly broad. Initially, it purports to encompass the entire transloading facility and not just those areas where waste transloading operations take place. With respect to the Commenters' activities, waste transloading will likely take place within a larger facility dedicated to commodity transloading, generally. The Department, in the performance of its duties under these regulations, does not have jurisdiction over non-waste transloading operations. Thus, its inspection, if any, should be limited to areas where waste transloading takes place. Additionally, access should be limited to "reasonable times," rather than "any time" and should also provide that the Department's representative shall be escorted by a facility employee. The Commenters are concerned about the Department representative's safety within the rail yard. With respect to subpart (5), the Commenters request clarification of what records, specifically, the Department would request to review and inspect, as certain records that Federal or State law may require rail carriers to maintain would have no bearing on environmental issues at the facility within the Department's jurisdiction. (See N.J.A.C. 7:26-2D.1(c)2xi.) (14)

RESPONSE: Department inspectors or their designated representatives must have access to all waste management areas. The rail carrier may provide an escort if they choose, as long as access to any solid waste activities is not restricted. See response to Comment 63 regarding times of inspections and records.

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65. COMMENT: County Authorities require proof of permits by any person who submits a bid to provide solid waste services related to the transfer, transportation and disposal of solid waste generated within its counties. By maintaining this requirement in future procurements, it ensures that only facilities that have endured an extensive environmental review and background check are submitting bids on public contracts. If a rail carrier wishes to submit a bid on a public contract, they too should have to comply with this requirement. (See N.J.A.C. 7:26-2D.1(c)xi., and 2D.1(d)23.) (11)

RESPONSE: The bidding specification requirements that a county may impose are beyond the scope of these regulations.

66. COMMENT: The Department has delegated some of its inspection responsibilities under the SWMA to local county agencies pursuant to the County Environmental Health Act (CEHA), N.J.S.A. 26:3A2-28. Therefore, where the proposed regulations discuss inspection of the facilities and of the records maintained by these facilities (see N.J.A.C. 7:26-2D.1(c)2xi), they should specifically provide that CEHA agencies are to perform their delegated enforcement role, and be permitted to perform inspections of the solid waste facilities that are operated by rail carriers, to ensure compliance with the SWMA and its implementing regulations. (11)

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RESPONSE: N.J.A.C. 7:26-2D.1(c)xi and (d)23 authorize the Department's representatives and inspectors to enter and inspect rail carrier facilities. CEHA agencies approved by the Department for solid waste inspections are designated representatives of the Department and, as such, are authorized to inspect the facilities.

67. COMMENT: N.J.A.C. 7:26-2D.1(c)2xii as written, with no standard in regard to amount, extent of release, remediation or environmental threat, is unworkable, a trap for the unwary and exceeds the Department's authority. As written, dropping a candy wrapper on the ground would be a violation. The Department has other regulations in effect which adequately address matters relating to the release of substances which pose a threat to the environment. (10) Moreover, incorporation of this provision is unnecessary to the extent that reporting of a release or discharge of a solid waste at the rail facility is already required under applicable spill regulations. (See N.J.A.C. 7:26-2D.1(c)2xii.) (14)

RESPONSE: It is not possible to set standards as the commenter requests since each spill is unique with respect to its potential harm to human health and the environment, depending on the material released or discharged, the location of the spill, its nearness to sensitive environmental receptors, etc. N.J.A.C. 7:26-2D.1(c)2xii, therefore, requires the facility to specify the type of

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substance discharged and the estimated quantity, the nature of the discharge, the location of the discharge, any action taken or proposed to be taken in order to mitigate the discharge, and any other information concerning the incident that the Department may request at the time of notification. The requirement to report releases or discharges of waste will remain in the adoption to ensure facilities report situations that threaten human health or the environment. The Department agrees with the commenter however, that some clarification is warranted. Only releases of solid waste that may harm human health or the environment must be immediately reported. Dropping a candy wrapper on the ground would not be a violation of N.J.A.C. 7:26-2D.1(c)2xii, since it would not harm human health or the environment. Therefore, the regulation will be revised to require reporting of releases of solid waste that would harm human health and the environment.

68. COMMENT: As good operating practice, an on-site emergency coordinator should be designated who will be available during all hours of operation for the purpose of handling emergency situations, such as spills, discharges or releases of solid waste. (See N.J.A.C. 7:26-2D.1(c)2xiii.) (14)

RESPONSE: The Department acknowledges receipt of the comment.

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69. COMMENT: Railroads are required pursuant to Federal law to keep records relating to the rail transportation of all commodities. The Department is preempted from adding additional requirements, such as N.J.A.C. 7:26-2D.1(c)2xiv. And 2D.2(d)26i-iv., particularly where, as in this case, the records are more appropriately kept by the shipper of the commodity. (10, 14) Rail carriers are obligated to accept lading (including solid waste shipments) based on bills of lading furnished to the carrier by the shipper but the Department is able to inspect such records and related waybills to the extent they are maintained under STB requirements. The Department cannot impose additional special recordkeeping and reporting requirements on rail carriers, such as the daily recordkeeping obligation imposed pursuant to this provision, as these requirements, in the aggregate, create an undue burden on rail operations. (See N.J.A.C. 7:26-2D.1(c)2xiv.) (14)

Moreover, rail carriers should not and may not be put in the role of monitoring delivery of waste to substantiate compliance with the waste flow system. The waste transfer activities that are addressed under these regulations are part of the transportation process itself. Nowhere else in the solid waste management system is a transporter obligated, in the midst of waste transportation (i.e., “in transit”), to police flow control or otherwise monitor the waste flow system by recordkeeping and reporting requirements. This is legitimately a function of landfills, waste transfer stations, etc. where waste transportation reaches an endpoint. In contrast,

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imposition of this policing obligation on transportation by rail carrier is an undue interference with the rail transportation process that is not required in other transportation contexts and is preempted. Elimination of this requirement will also advance State transportation policy (i.e., reducing truck traffic) by eliminating unnecessary recordkeeping and reporting, thereby improving the efficiency and attractiveness of rail transport. (14)

RESPONSE: N.J.A.C. 7:26-2D.1(c)2xiv and 2D.1(d)27 require rail carriers to maintain daily records of, among other things, transporters utilizing the facility, and the source and destination of waste shipments, to summarize this information into quarterly reports and to submit the quarterly reports to the Department. The Department inputs this information, along with reports from all solid waste facilities operating in the State, into a database that the Department utilizes to track and monitor waste generation rates and disposal patterns. The Department has determined that it is in the public interest to know the quantities of waste generated and how it is managed in the State for planning purposes and to assess the State's solid waste management system. These data help the Department determine how to allocate resources in attempting to accomplish State goals such as the recycling rate mandated by law, as well as ensuring sufficient waste disposal capacity for citizens of the State. Moreover, the Department does not agree that it is preempted from adding record keeping requirements simply because rail carriers are required to maintain certain types of reports pursuant to requirements of the STB or Federal Railroad

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Administration. The reports required by those agencies relate to economic and safety issues and have nothing to do with the environmental responsibilities of the State. Rather, the Department's ability to regulate rail carrier activities that impact the environment remains intact. Accordingly, the record keeping requirements of this paragraph of the rule are within the Department's jurisdiction.

As to rail carriers monitoring the delivery of waste to substantiate compliance with the waste flow system, there is a legal basis to make sure such waste is properly accepted. Waste from a county with waste flow is owned by that county. If a rail carrier were to accept flowed waste without the respective county's authorization, the rail carrier would be stealing waste from the county. Therefore, the facility is obligated to check that it does not engage in an illegal activity.

70. COMMENT: For the reasons previously stated at Comment 46, the Commenters contend that the transfer of solid waste in sealed containers is fully exempted on the basis that no waste handling activities take place and the handling of these containers is factually indistinguishable from any other intermodal container handled daily by rail carriers. (14) Since the Commenter contests the authority of the Department to regulate rail facilities under the SWMA, N.J.S.A. 13:1E-1 et seq., the threat of or actual imposition of penalties at N.J.A.C. 7:26-2D.1(c)2xv. is similarly preempted. (10) In addition, the propriety of imposing penalties upon rail carriers

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pursuant to the SWMA, N.J.A.C. 7:26-5 for failure to operate in compliance with the requirements of the proposed regulations must be determined on a case by case basis.

Accordingly, the Commenters reserve the right to raise preemption of any purportedly applicable requirement as a defense to any action for penalties pursuant to the SWMA. (See N.J.A.C. 7:26-2D.1(c)2xv.) (14)

RESPONSE: While the ICCTA preempts State authority to permit solid waste transfer operations, it did not preempt the Department's ability to impose penalties for failure to operate in accordance with non-preempted regulations.

N.J.A.C. 7:26-2D.1(d)

71. COMMENT: The storage limit for both "non-putrescible" and "putrescible" waste should be 72 hours at facilities that accept and tip both types of waste. As a practical matter, it would be difficult for a rail facility that is accepting and tipping loads of both types of waste to maintain strict separation of the two. It is also possible that loads could contain a mixture of waste types and that operators might inadvertently classify such a mixture as "non-putrescible."

Furthermore, it is possible that some truly "non-putrescible" wastes such as solvent-based finishes, adhesives, carpeting or engineered wood products emit gases that could accumulate over a long period of time. (5, 7)

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RESPONSE: It is possible that facilities will be able to properly segregate putrescible and non-putrescible loads either through utilizing different areas of a tipping floor or by processing only putrescible or non-putrescible waste at a given time. If putrescible and non-putrescible were to be mixed, the mixed load would be required to be managed as putrescible. Regardless of whether the waste is putrescible, the facility must be operated so that odors do not migrate outside the enclosed building in accordance with N.J.A.C. 7:26-2D.1(d)8.

72. COMMENT: The Department's proposed regulations for rail transfer operations are overly restrictive of railroads and could readily accomplish the Agency's primary goals of protecting the State's environment and citizenry without some of the more stringent requirements of the regulations. Particularly, requiring the construction of a building to house transload operations is a major obstacle to the shipment of waste materials by rail and will ultimately provide an unfair advantage to the trucking industry. Since trucking creates many times more air emissions per ton-mile than rail transport, the long-term effect of the proposal could be just the opposite of what was intended. Rather than require a building, the Department's goals could be accomplished through well-conceived operational regulations such as the following:

- (1) No waste material can be placed on the ground outside of a building, and all

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waste not transloaded through a building must be transloaded directly from truck into railcar without intermediate placement or spillage on the ground or in an intermediate holding area;

(2) Operator must provide adequate dust controls such that no fugitive dust escapes at any time from the transload site.

Use of a tipping device, dust suppression controls, and high-sided railcars can provide the same type of protection without a building as operations conducted in a building, ensuring that waste material does not touch the ground. These same or similar protections would be readily enforceable by the Department through visual inspection and continual perimeter air monitoring, both of which could be made a part of the Department's rail transload approval process. (6)

RESPONSE: The Department does not believe outdoor transfer operations can occur and be protective of human health and the environment in all situations. The transfer of waste from one vehicle to another presents opportunities for releases, particularly in windy conditions. Often dust control in outdoor operations consists of spraying water on lightweight material to keep it wet and heavy to prevent being windblown. Water spraying for dust control may be impractical in freezing weather conditions experienced during winter months in New Jersey. Therefore, the

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regulations require that all transfer station operations take place within the confines of an enclosed building to ensure there are adequate odor, dust, leachate, stormwater and litter controls in place to reduce these risks.

73. COMMENT: The requirement at N.J.A.C. 7:26-2D.1(d)1 to conduct transloading activities within the confines of an enclosed building that complies with all requirements of the Uniform Construction Code exceeds the scope of the Department's legitimate police power concerns in view of the narrower permit exemption concept advocated by the Commenters. In this context, transloaded materials have only minimal contact with the environment as they are moved from one container to another or temporarily staged on an impermeable surface or in a staging container proximate to the railcar to facilitate safe and efficient loading, without contacting the bare ground and without remaining for any significant period of time outside of a container. (14)

Furthermore, the requirement to conduct transloading activities within the confines of an enclosed building that complies with all requirements of the Uniform Construction Code exceeds the scope of the Department's legitimate police power unless such is shown to be necessary to protect the environment at the particular rail facility involved. The limited environmental concerns raised by transloading operations can be readily addressed in a far less costly manner, e.g., through compliance with applicable air pollution control requirements for fugitive dust

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control and stormwater and wastewater management requirements as may be appropriate and reasonable pursuant to the State's police powers. This approach would address environmental risks consistent with Federal preemption and State transportation policy aimed at removing (or avoiding) impediments to rail transportation. Therefore, the requirement that all loading be done within a building, regardless of waste type should be eliminated. (10)

N.J.A.C. 7:26-2D.1(d)1 unnecessarily requires that all processing, tipping, sorting, loading, storage and compaction of materials shall occur within the confines of an enclosed building. (8)

In addition to the limited environmental contact associated with rail transfer operations, many types of waste carried by rail, e.g., contaminated soil, dredge materials, automobile shredder residue (ASR) and many types of demolition and construction debris, do not present the kind of environmental risks that need to be addressed by requiring transload operations to take place in an enclosed building. By comparison, in many instances, the Department has seen fit not to require that recycling operations take place in enclosed facilities. Similar considerations apply to solid waste rail carrier transloading activities, which, like recycling, is a solid waste management technique which State policy seeks to foster and that has limited environmental impacts that can be readily addressed by other means. (14)

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The Commenter recognizes that transloading of uncontainerized waste may involve different environmental and health concerns than the transloading of intermodal containers. Although those concerns may affect the manner in which the railroad will handle those operations in order to remain in compliance with the Department's generally applicable health and safety regulations, those concerns do not affect or limit the preemption of the Department's authority to regulate the manner in which railroad facilities are constructed and operated. Further, the proposed regulations fail to acknowledge and take into consideration that different types of solid waste may require different facilities, instead imposing on all solid waste transloading the cookie-cutter requirements of a "transfer station." Clearly, the loading of construction debris (type 13C waste), shredded ASR and baled MSW, for instance, presents different environmental concerns than curb collected loose garbage. (10)

While this requirement is appropriate for municipal solid waste (MSW), it is entirely unnecessary for construction and demolition (C&D) waste. Such waste is non-putrescible and has only minimal contact with the environment during the transload process. The most significant concern is dust generation during handling, which can be controlled by water sprays to wet the material. Tipping on a curbed concrete pad without a roof is environmentally safe, with adequate provision of water sprays and storm water control. Retaining this requirement will handicap rail transload facilities because it is much more difficult to load railcars within the

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confines of a building. It would be a tremendously expensive and logistical challenge to construct an enclosed building that is large enough to accommodate trucks, rail cars, cranes, backhoes, front-end loaders, and other heavy equipment necessary for transloading. Such an additional unnecessary expense will be detrimental to the economics of rail transportation, which consequently will remove more trucks from New Jersey's highways since the number of trucks which can be unloaded in a day will decrease. Because the limited environmental concerns raised by C&D transloads can be addressed in a much less onerous and costly manner, the requirement of an enclosed building is an unreasonable exercise of the State's police powers. Therefore, the Department should amend its regulations to exempt facilities that handle Type 13C C&D waste (that is not mixed with other waste types) from the requirement to tip in an enclosed building. (8)

Additionally, due to the nature of the equipment involved in transloading operations, it would be extremely costly and logistically challenging to build an enclosed building large and versatile enough to accommodate trucks, rail cars, cranes, backhoes, front-end loaders or other similar heavy equipment, conveyor systems or such other systems as may be used to transload these materials.

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For these reasons, the enclosed building requirement and other operational limitations that are not narrowly tailored to address specific environmental objectives within the State's police power, will run afoul of Federal preemption and will seriously impair rail carriers' ability and willingness to expand operations in a manner that will result in significant transportation benefits for the State. The limited environmental concerns raised by transloading operations can be readily addressed in a far less costly manner, e.g., through requiring compliance with applicable air pollution control requirements for fugitive dust control and stormwater and wastewater management requirements as may be appropriate and reasonable pursuant to the State's police powers. This approach would address environmental risks consistent with Federal preemption and State transportation policy aimed at removing (or avoiding) impediments to rail transportation. (14)

RESPONSE: It is within the scope of the Department's police powers to require that the transfer of solid waste is conducted in a manner that is protective of human health and the environment. Although there are greater environmental concerns associated with the management of municipal solid waste than with construction and demolition waste, all waste processing operations present environmental risk. The transfer of waste from one vehicle or container to another presents opportunities for releases, particularly in high wind situations associated with outdoor operations. Water spraying for dust control may be impractical during freezing weather

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conditions experienced during the winter in New Jersey. The Department is requiring all transfer station operations take place within the confines of an enclosed building to ensure there are adequate odor, dust, leachate, stormwater and litter controls in place to reduce these risks.

74. COMMENT: Any requirement for a “tipping floor” or other structure as required at N.J.A.C. 7:26-2D.1(d)2 must be adapted to the requirements of the specific rail facility involved so that only the Department’s generally applicable stormwater and waste water management requirements are met. (10)

RESPONSE: N.J.A.C. 7:26-2D.1(d)2 does not specify how tipping floors must be constructed; it only requires that the facility have a concrete or equivalent tipping floor to ensure proper containment and channeling of wastewater to sanitary sewer connections or holding tanks and that the floor be constructed to withstand heavy vehicle usage, in compliance with applicable rules regarding the discharge of wastewater and holding tanks at N.J.A.C. 7:14B.

75. COMMENT: In view of the narrower exemption for transloading operations proposed by the Commenters at Comment 14, a blanket requirement to have a concrete tipping floor is unnecessary. As proposed by Commenters, waste would not be put on the bare ground as part of transloading activities and would only, in certain instances, be temporarily staged on an

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impermeable surface (concrete or other similar material) or in a staging container proximate to the railcars to which waste would be temporarily transferred as part of a continuous transloading operation, to the limited extent necessary to facilitate safe and efficient transloading operations. This leaves a wide range of transloading operations that involve transfers to or from railcars without the need for any interim staging outside the railcar or motor vehicle to or from which the waste is being transferred. For the latter activities, an impermeable surface with channeling of wastewater is not necessary and should not be required. On the other hand, where waste is temporarily staged outside of the motor vehicle or railcar, we agree that it should be staged on an impermeable surface with proper channeling of wastewater. Therefore, we propose the following wording for this section: “Anywhere within the facility that waste is intended to be temporarily staged outside of the railcar or motor vehicle to or from which it is being transferred, such staging shall take place on an impermeable surface (concrete, asphalt or equivalent) on which the waste shall be placed to ensure proper channeling of wastewater to sanitary sewer connections or holding tanks and constructed to withstand heavy vehicle usage, in accordance with applicable rules regarding the discharge of wastewater and stormwater management at N.J.A.C. 7:14A.”. (See N.J.A.C. 7:26-2D.1(d)2.) (14)

RESPONSE: The transfer of waste from one vehicle to another presents opportunities for releases. The Department does not believe outdoor transfer operations can occur and be

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protective of human health and the environment in all situations, particularly in windy conditions. Therefore, the regulations require that all transfer station operations take place within the confines of an enclosed building to ensure there are adequate odor, dust, leachate, stormwater and litter controls in place to reduce these risks.

76. COMMENT: Any requirement for a wastewater collection and disposal system, such as N.J.A.C. 7:26-2D.1(d)3, must be tailored to the particular facility involved and only required to the extent needed so that the Department's generally applicable stormwater and waste water management requirements are met. (10)

RESPONSE: N.J.A.C. 7:26-2D.1(d)3 generally require all facilities to have a waste water collection system that collects, stores and properly disposes of wastewater generated during normal operations, including wash out and cleaning of equipment, trucks and floors in compliance with the applicable rules regarding wastewater and stormwater management at N.J.A.C. 7:14A. Specific design of a particular wastewater collection system is not mandated by the rule. Accordingly, a facility may tailor its wastewater collection and treatment system to meet its needs, as long as the system complies with the applicable wastewater and stormwater management rules at N.J.A.C. 7:14A. Nevertheless, all facilities that engage in any form of solid

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waste tipping must have a wastewater collection, storage and disposal system pursuant to this section of the SWMA rules.

77. COMMENT: At N.J.A.C. 7:26-2D(d)3, the first sentence should be revised to be consistent with the basic transfer station operating requirements of N.J.A.C. 7:26-2B.5(b) as follows:

“3. Facilities shall have a system that collects, stores, treats, and properly disposes of wastewater generated during normal operations . . .”

This change ensures that standard practices of transfer station design and operation are followed at a rail facility that conducts tipping of solid waste. (5)

RESPONSE: The word “treat” was not included in the regulation since many systems used by transfer stations do not treat the wastewater generated. However, the regulation does not preclude a facility from having a wastewater treatment system if warranted.

78. COMMENT: Because normal transloading operations may generate wastewater, e.g., in connection with washout and cleaning of equipment and containers, the requirement to utilize a

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system to collect, store and properly dispose of wastewater, may be permissible under the State's police power. (See N.J.A.C. 7:26-2D.1(d)3.) (14)

RESPONSE: The Department acknowledges receipt of the comment.

79. COMMENT: Transloading activities covered by the permit exemption as Commenters propose at Comment 14 above will not involve the deposition or storage of uncontainerized solid waste. (14) Unlike transfer stations, rail facilities operate at all hours on practically all days of the year. N.J.A.C. 7:26-2D.1(d)4, which requires cleaning the area where waste has been deposited or stored, is unnecessary and impractical under such circumstances, and not permissible except to the extent shown to be necessary so that only the Department's generally applicable performance related environmental requirements are met as set forth in the Village of Ridgefield Park v. New York, Susquehanna & Western Ry. Corp., 750 A.2d 57, 163 N.J. 446 (N.J. 2000). (10, 14) Cleaning of any temporary staging area which is part of the continuous transload process covered by the narrow exemption proposed by Commenters at Comment 14 would be appropriate. (See N.J.A.C. 7:26-2D.1(d)4.) (14)

RESPONSE: The Department is not limiting the exemption to only those transloading activities proposed in Comment 14. The regulations authorize a rail carrier to place waste on a tipping

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floor for processing. N.J.A.C. 7:26-2D.1(d)4 requires a facility to clean each area where waste has been deposited or stored every 24 hours as a measure to provide odor and dust control.

80. COMMENT: With the exception of fully sealed intermodal containers, it is not expected that normal facility transloading operations would require the storage of waste overnight in accordance with the permit exemption that the Commenters propose. Moreover, in the unlikely event that waste that is not in sealed containers would remain at the facility overnight, it would likely be stored in the source or destination container, and not on the ground. Nevertheless, the Commenters recognize the potential for odors from the source and destination containers and acknowledge the potential need to control such odors for certain wastes. Since, the requirement to effectively treat waste to be stored overnight in sealed containers prevents odors associated with putrefaction, it may be a permissible operational requirement under the State's police power and not preempted. (See N.J.A.C. 7:26-2D.1(d)5.) (14) The Commenter recognizes the potential for odors and the potential need to control such odors for certain wastes, so long as the standard is determined at the railroad's property line. (See N.J.A.C. 7:26-2D.1(d)5.) (10)

RESPONSE: The Department acknowledges receipt of the comment. Odor potential at the property line will vary according to climate conditions. N.J.A.C. 7:26-2D.1(d)8 specifies that

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solid waste tipping operations may not result in the migration of odors outside the confines of the enclosed building to prevent waste odors from emanating to off-site receptors.

81. COMMENT: N.J.A.C. 7:26-2D.1(d)6, which requires maintaining the facility property surrounding the actual waste management area free of litter, debris, and accumulations of waste and effluents may be a reasonable requirement (depending upon the nature of that regulation and the enforcement mechanisms used by the Department); however, because there will be no processing under the permit exemption as proposed by the Commenters at Comment 14 above, unprocessed waste and process residuals will not be accumulated and should therefore not be referenced in these regulations. (10, 14)

RESPONSE: The Department is not limiting the exemption to those transloading operations described in Comment 14. Therefore, the requirement will remain in the regulations.

82. COMMENT: In view of the narrowed permit exemption proposed by the Commenters at Comment 14 above, controlling the migration of dust offsite should be sufficient to protect against any foreseeable harms and therefore satisfy any police power concerns that may arise. Existing dust control requirements applicable to transfer stations under the SWMA require only the prevention of offsite migration of dust. To the extent the requirements applicable to rail

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transloading facilities with respect to dust control go beyond what is required at non-rail facilities, those requirements discriminate against the former and are therefore preempted. (14)

Controlling the migration of dust off site should be sufficient to protect the environment. (See N.J.A.C. 7:26-2D.1(d)7.) (10)

RESPONSE: All non-rail carrier solid waste facilities must have methods of effectively controlling dust in order to prevent offsite migration in accordance with N.J.A.C. 7:26-2.11(b)4. Pursuant to N.J.A.C. 7:26-2B.5(b)7, non-rail carrier transfer stations are required to be designed in a manner which will prevent the migration of odors and dust outside the confines of the enclosed building in order to receive a permit from the Department. Therefore, the requirements regarding dust control do not discriminate against rail carrier facilities.

83. COMMENT: In light of the narrowed permit exemption proposed at Comment 14, the narrowed scope of permissible activities and the proposed elimination of the enclosed building requirement, compliance with N.J.A.C. 7:27-5.2(a) should be sufficient to protect against any foreseeable air pollution harms and therefore satisfy any police power concerns that may arise from odor or other air pollution issues. (14)

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RESPONSE: The requirement will remain in the regulations since the Department is not limiting the exemption to the activities described in Comment 14.

84. COMMENT: The requirement at N.J.A.C. 7:26-2D.1(d)11 for certified scales is solely for the reporting requirements of N.J.A.C. 7:26-2.13, and are, therefore, preempted. Accordingly there is no need for scales. (10)

RESPONSE: The use of certified scales is the only reasonable way to accurately determine the quantity of waste transported by trucks to and from the facility. These data are necessary to accurately complete the daily reports and monthly summaries required by N.J.A.C. 7:26-2D.1(d)27. The Department inputs the information collected from the monthly reports from all solid waste facilities operating in the State into a database to track and monitor waste generation rates and disposal patterns. The Department has determined that it is in the public interest to know the quantities of waste generated and how waste is managed in the State. The Department uses these data for planning purposes, including assessing the State's solid waste management system. The data help the Department determine how to allocate resources in attempting to accomplish State goals, such as achieving the recycling rate mandated by law, as well as ensuring sufficient waste disposal capacity for citizens of the State. Moreover, the reporting

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requirements in the regulations are not preempted, as discussed above in response to Comment 69.

85. COMMENT: Any health or environmental concerns addressed by the obligation to ensure that the facility's onsite roadways and storage areas have concrete or asphalt paving in those areas subject to vehicle loading and unloading are adequately addressed by N.J.A.C. 7:26-2D.1(d)2, 3 and 7 and therefore N.J.A.C. 7:26-2D.1(d)12 should be deleted. Moreover, as noted in connection with the Comment 75 to N.J.A.C. 7:26-2D.1(d)2, only areas where waste is temporarily staged on an impermeable surface outside the motor vehicle or railcar to or from which it is being transferred need to be paved with impermeable concrete or asphalt surfaces and not where transloading without interim staging on such a surface outside the motor vehicle or railcar takes place. The additional requirements under this regulation would require costly improvements at rail yards (without concomitant benefits) thereby increasing the cost of and raising the burdens to rail transportation, and are preempted. (14)

RESPONSE: The regulations referenced in the comment apply to controls to prevent leachate, wastewater and dust from migrating out of the enclosed transfer station building. N.J.A.C. 7:26-2D.1(d)12 requires on-site roadways and outdoor areas where waste may be stored in containers or trucks to have concrete or asphalt paving as a measure to prevent the creation of a public

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nuisance caused by excessive dust generation resulting from trucks traveling on unsurfaced roadways, as well as soil and groundwater protection from any leaks from trucks or containers holding waste. Preventing the migration of leachate, wastewater and dust from enclosed transfer station buildings is a separate issue from paving requirements for on-site roadways and outdoor waste storage areas and these issues are accordingly regulated by separate provisions of these rules.

86. COMMENT: The prohibition against queuing and staging of solid waste vehicles on a public roadway at N.J.A.C. 7:26-2D.1(d)13 does not appear to implicate any significant environmental concerns related to rail transloading activities. Rather, this prohibition would impose an unreasonable and unrelated (to transloading) administrative burden on such activities by requiring the policing of off-site activities of shippers delivering waste for rail transport. This requirement is therefore federally preempted. (10, 14) Further, a rail carrier's common carrier obligations would preclude it from turning away these vehicles. See 49 U.S.C. § 11101. To the extent a valid police power concern may exist, that concern can and should be addressed in a less burdensome manner, e.g., by imposing a prohibition against queuing and staging on a public roadway on the solid waste vehicles themselves, rather than on the rail transloading facility. (14)

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RESPONSE: Trucks waiting to enter a facility by queuing on public roadways outside a facility gate present traffic hazards for motorists. N.J.A.C. 7:26-2D.1(d)13 and 14 prohibit the queuing and staging of solid waste vehicles on any public roadway, and while on access roads servicing the facility, the queuing and staging of solid waste vehicles must be conducted so as to prevent traffic backups and related traffic hazards. These regulations require rail carriers be responsible for ensuring their operations do not endanger the public traveling on public roadways outside the facility. Accordingly, rail carriers must protect the public interest by alleviating conditions that would result in trucks backing up onto public roadways.

87. COMMENT: Traffic flow issues internal to the transloading facility are no different for waste-containing vehicles than for non-waste containing vehicles. Imposition of substantial regulatory burdens would, in either event, impermissibly interfere with interstate commerce. Therefore, N.J.A.C. 7:26-2D.1(d)14. should be eliminated. (10, 14)

RESPONSE: Trucks queuing on public roadways outside a facility gate present traffic hazards for motorists. N.J.A.C. 7:26-2D.1(d)13 and 14 prohibit the queuing and staging of solid waste vehicles on any public roadway, and while on access roads servicing the facility, the queuing and staging of solid waste vehicles must be conducted so as to prevent traffic backups and related traffic hazards. These regulations require rail carriers be responsible for ensuring their

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operations do not endanger the public traveling on public roadways outside the facility.

Accordingly, rail carriers must protect the public interest by alleviating conditions that would result in trucks backing up onto public roadways.

88. COMMENT: The justification for designating a separate, secure area for transloading from exempt vehicles or vehicles in need of manual unloading is not present at a transloading operation which does not engage in sorting, compaction and other processing and tipping activities related thereto. (See N.J.A.C. 7:26-2D.1(d)17.) (10, 14)

RESPONSE: A designated secure area located a safe distance from the tipping area for exempt vehicles or those that are to be manually unloaded would only be applicable if the rail carrier were to conduct such activities.

89. COMMENT: N.J.A.C. 7:26-2D.1(d)18 points out the underlying premise of this Commenter's previous observation, that the type of solid waste handled at a rail facility must be considered when determining what facilities are necessary to comply with the Department's generally applicable environmental regulations. (10)

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RESPONSE: If a rail carrier decides to accept asbestos containing waste material, a separate secure area may be established pursuant to N.J.A.C. 7:26-2D.1(d)18. Whether to establish a separate area is at the rail carrier's discretion.

90. COMMENT: The meaning of N.J.A.C. 7:26-2D.1(d)18 is unclear. As written, the provision appears to require that, to the extent that a rail carrier elects to accept asbestos containing waste material, it "may" establish a separate secure area for drop-off and/or transfer of such waste, but must ensure that the container used for drop-off and/or transfer is fully enclosed (i.e. sealed) and located on an impermeable surface and that only facility personnel or a licensed commercial asbestos removal contractor load such waste into the container used for drop-off and/or transfer. If the Department intended to require compliance with these requirements in all instances where a rail carrier chooses to accept asbestos waste for transportation, the existing language does not achieve the desired effect and should be revised to provide that the rail carrier "shall" establish a separate secure area for asbestos waste if the rail carrier elects to accept such waste. Also, the rationale for the requirement that the container be located on an impermeable surface is unclear and an impermeable surface is unnecessary. (14)

RESPONSE: N.J.A.C. 7:26-2D.1(d)18 gives rail carriers an option to establish a separate secure area to receive asbestos containing waste material. Therefore, the word "may" will

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remain in the regulation. The container must, however, be placed on an impermeable surface so that any accidental releases from the container or while loading or unloading can be readily remediated.

91. COMMENT: Due to the mobile nature of “rail cars and other transportation vehicles,” it is not possible to “equip” them with a means of secondary containment as required by N.J.A.C.

7:26-2D.1(d)19i. (10, 14) Moreover, other provisions already address the need to control spills and other releases. (10) To the extent that the Department intended that the facility be equipped to prevent leaked waste from being discharged to the environment, this obligation is imposed pursuant to proposed N.J.A.C. 7:26-2D.1(d)2, 3, 12, 24 and 25. Therefore, this provision is both impracticable and potentially redundant. For these reasons, the Commenters propose that it be deleted. (14)

RESPONSE: The Department disagrees that N.J.A.C. 7:26-2D.1(d)2, 3, 12, 24 and 25 impose an obligation to prevent leaked waste from being discharged into the environment. N.J.A.C. 7:26-2D.1(d)19 exempts ID 72 liquid waste facilities from the tipping floor requirements of paragraph (d)2. Compliance with the other cited regulations would not prevent leaked waste from entering the environment. N.J.A.C. 7:26-2D(d)19i is modeled after requirements found in the Spill Compensation and Control Act regulations. Specifically, N.J.A.C. 7:1E-2.3 requires

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that tank car or tank truck loading or unloading areas employed in the loading or unloading of hazardous substances shall be paved or surfaced with impermeable materials, and equipped with an adequate means of secondary containment or diversion designed and built pursuant to N.J.A.C. 7:1E-2.6. The requirements of N.J.A.C. 7:26-2D.1(d)19i to block all probable routes by which leaked waste could reasonably be expected to become a discharge and have a capacity to contain the volume of the largest compartment in any tank car or tank truck utilizing the area can be found in N.J.A.C. 7:1E-2.6. These requirements will remain as a means to prevent any leaked waste from being discharged into the environment.

92. COMMENT: The Department does not have the authority to determine when, or how quickly, railroad cars are moved by a railroad, as this is an area that is clearly within exclusive Federal jurisdiction. (See N.J.A.C. 7:26-2D.1(d)19ii.) (10)

RESPONSE: The regulation does not specify any time limits with regard to movement of rail cars. The only time limits imposed by these rules apply to the storage of wastes at the site. The time limitations that waste may remain at a facility are 72 hours for putrescible waste, 10 days for non-putrescible waste and up to 180 days for ID 72 liquid waste stored in sealed containers. Facilities that store waste in any container, including in a rail car, must abide by these time

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limits. It is the waste and its storage that is regulated by this rule and not the mode and speed by which rail cars are moved by a railroad.

93. COMMENT: The Commenters do not anticipate ID 72 waste will be stored at transloading facilities. Nevertheless, when trucks or rail cars remain on site at a transloading facility until transloading is complete and to the extent that this constitutes storage, the Commenters acknowledge that such tank trucks or cars should be in good condition and not leaking as required by N.J.A.C. 7:26-2D.1(d)19iii. (14)

RESPONSE: The Department acknowledges receipt of the comment.

94. COMMENT: The Commenters do not anticipate ID 72 waste will be stored at transloading facilities. Due to the nature of transloading (i.e., transferring waste directly from the incoming tank truck to the outgoing tank car, or vice versa, via a hose or other direct conveyance, without intermediate storage or containment), the only storage containers that would arguably be used at a transloading facility are the source and destination tank truck or car. As discussed with respect to proposed N.J.A.C. 7:26-2D.1(d)19i, due to the mobile nature of these vehicles, it would not be possible to “equip” them with a secondary containment system. Moreover, they are already designed to hold waste in transport without leakage in the ordinary course. For this reason,

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N.J.A.C. 7:26-2D.1(d)19iv.should be revised to apply only to true intermediary containers, and not to source or destination mobile containers. (14)

RESPONSE: N.J.A.C. 7:26-2D.1(d)19iv applies to containers and aboveground tanks in which liquid waste is stored at a facility, not to the transportation vehicles including trucks and rail cars. Any containers or tanks must be equipped with a secondary containment system designed to prevent released waste from migrating out of the system to the soil, groundwater or surface water. Any pumping to or from transportation vehicles must be conducted with spill containment in accordance with N.J.A.C. 7:26-2D.1(d)19i.

95. COMMENT: The Commenters request further clarification of what constitutes “storage” and what constitutes a “container,” as rail transloading operations should not be precluded from allowing, if necessary, trucks or rail cars to remain on-site at a transloading facility until transloading is completed with respect to that truck or car. While these trucks and rail cars should be considered acceptable containers for the purposes of limited “storage” until transloading is complete under N.J.A.C. 7:26-2D.1(d)19ii, they should not be deemed “containers” such that secondary containment requirements apply pursuant to N.J.A.C. 7:26-2D.1(d)19iv. (14)

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RESPONSE: The term “container” is defined in N.J.A.C. 7:26-1.4 to mean any portable device in which solid waste is stored, transported, disposed of, or otherwise handled. Although “storage” is not specifically defined, it applies to where waste is held while not in transit. The commenter is correct that it is acceptable to hold waste in trucks and rail cars until transloading is completed under N.J.A.C. 7:26-2D.1(d)19ii. The secondary containment provisions of N.J.A.C. 7:26-2D.1(d)19iv apply to containers and tanks at a facility that are not part of the transportation vehicle.

96. COMMENT: The railroad should be entitled to rely upon the chemical analysis of the commodity presented for transportation by its shipper, just as it does for other commodities. (See N.J.A.C. 7:26-2D.1(d)19v.) (10)

RESPONSE: N.J.A.C. 7:26-2D.1(d)19v requires the rail carrier to obtain and have knowledge of the chemical and physical characteristics of the liquid waste. This information may be obtained from the shipper or the generator of the waste. If this information is not available to the rail carrier from either the generator, shipper, or other means, then the rail carrier may collect a sample and analyze the waste to obtain needed data.

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97. COMMENT: The Commenters request a clarification of N.J.A.C. 7:26-2D.1(d)19v. First, it is unclear whether the transloading facility may rely upon waste analyses for a representative sample of the waste obtained from the originator or transporter of the waste, rather than obtain their own analyses. Second it is unclear whether analyses must be obtained with each shipment or from each source or for each type of ID 72 waste, regardless of the number of shipments or identity of the source. The facility should be entitled to rely upon the shipper's analysis and representative sampling and analysis should suffice. In addition, rail carriers are required to accept the lading tendered to them as described by a shipper bill of lading. (14)

RESPONSE: N.J.A.C. 7:26-2D.1(d)19v requires the rail carrier to have knowledge of the chemical and physical characteristics of the liquid waste. This information may be obtained through the shipper or by the rail carrier if it analyzes a sample of the waste prior to receipt at the rail facility. The regulation requires the analysis be repeated as necessary to ensure it is accurate and up to date. Therefore, the analysis does not have to be conducted on every shipment provided the rail carrier has knowledge that the waste material is consistent with previous shipments.

98. COMMENT: Stopping any detected releases of ID 72 waste and cleaning up and properly managing the released waste and repairing or replacing leaking containers or tanks prior to

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returning them to service is good operating practice which would be followed in any event. (See N.J.A.C. 7:26-2D.1(d)19viii.) (14)

RESPONSE: The Department acknowledges receipt of the comment.

99. COMMENT: While the Commenters acknowledge that these amendments are intended only to allow rail transloading facilities to accept solid waste that is neither hazardous nor regulated medical waste, hazardous waste and regulated medical waste permit requirements are preempted to the same extent as the permits that are the subject of this rule making and the Commenters reserve the right to challenge the necessity of obtaining such permits on the basis of preemption. (See N.J.A.C. 7:26-2D.1(d)20.) (14) Although the Department has chosen in these proposed regulations to address only the preemption of its regulation of rail facilities that handle solid waste, it is clear that the same preemption applies to all commodities. (See N.J.A.C. 7:26-2D.1(d)20.) (10)

RESPONSE: The Department does not believe that case law interpreting the ICCTA and its preemption of the Department's authority over rail carriers is clear as it pertains to medical waste, hazardous waste, or recyclable materials. The Department is evaluating whether its

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regulations regarding these other noted waste types are preempted by the ICCTA, and therefore, cannot confirm the commenter's statement that the Federal preemption applies.

100. COMMENT: N.J.A.C. 7:26-2D.1(d)20 prohibits acceptance or handling of hazardous waste or regulated medical waste at a rail facility that engages in solid waste tipping and requires notification of acceptance of unauthorized waste types. The standard does not require, however, any type of waste inspection plan that would be used to enforce this type of prohibition. An operator could simply not notice significant quantities of unacceptable waste. The Department should add a requirement for development and implementation of a waste inspection plan, similar to the type of plan required under N.J.A.C. 7:26-2.10(b)9vii. A new section at N.J.A.C. 7:26-2D(d)27 could be added with language from this existing standard as follows:

27. A waste inspection plan shall be developed and implemented, which shall include a program for detecting and preventing the disposal of all unauthorized waste types, including regulated hazardous and medical wastes. This program shall include, at a minimum, but not be limited to, the following:

- i. Random inspections of incoming loads unless the owner or operator take other steps to ensure that incoming loads do not contain unauthorized waste types, including regulated hazardous waste or TSCA waste;

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- ii. Records of any inspections;
 - iii. Training of facility personnel to recognize any unauthorized waste types, including regulated hazardous waste; and
 - iv. Notification procedures to report to the Department any discovery of any unauthorized waste types, including regulated hazardous waste at the facility.
- (5, 7)

RESPONSE: The rail carrier solid waste regulations being adopted specify design, operational and record keeping requirements, but do not specify plans (such as inspection and facility maintenance) as is required to be included in permit applications for non-rail carrier facilities. The regulations do not require the development and implementation of an inspection plan by rail carriers since such a plan is not subject to review by the Department to ensure adequacy. Rail carrier transfer facilities that are not authorized to accept hazardous and regulated medical wastes are subject to violations for failure to comply with this requirement. Therefore, rail carriers should take reasonable inspection measures of their own accord to ensure unauthorized waste types are not processed at their facilities.

101. COMMENT: The Commenters previously submitted comments to the Department on the draft version of these proposed regulations, which was circulated for stakeholder comment. The

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comments suggested with respect to N.J.A.C. 7:26-2D.1(d)21 that a facility could not be deemed an unpermitted solid waste facility subject to penalties if the facility is exempt from permitting requirements on the basis that permitting requirements are Federally preempted. It appears that the Department has revised this provision to eliminate the assertion that a facility would be deemed an unpermitted waste facility subject to penalties for failing to comply with limitations upon the duration of storage of certain wastes. The Commenters commend the Department's revisions to this provision. (14)

RESPONSE: The Department acknowledges receipt of the comment.

102. COMMENT: While the Commenters fail to see any direct environmental implication of maintaining security procedures to control entry to and exit from the facility at all times as required by N.J.A.C. 7:26-2D.1(d)22, (10, 14) they recognize the State's concern and anticipate that such security measures would be implemented in any event. (14) While railroads have an interest in maintaining security for a variety of reasons, including prevention of unlawful dumping on their properties, those concerns apply across the State, regardless of whether a particular location is used for loading of solid waste. (10)

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RESPONSE: N.J.A.C. 7:26-2D.1(d)22 requires rail carriers to implement security procedures to control entry and exit at all times to ensure the wastes are safe from unauthorized activities or tampering that would compromise the operational standards contained in the regulations designed to protect human health and the environment.

103. COMMENT: With respect to the requirements at N.J.A.C. 7:26-2D.1(d)23, see comment on N.J.A.C. 7:26-2D.1(c)2xi. at Comment 63 above. (10)

RESPONSE: The Department or its designated representatives would normally inspect facilities during operating hours unless extenuating circumstances warrant a special investigation. The inspectors would only check the facility records to ascertain compliance or noncompliance with Federal or State environmental regulations and statutes.

104. COMMENT: Reporting of a release or discharge of a solid waste at the rail facility appears to be reasonably related to a valid police power concern and therefore this may be a permissible regulation. (See N.J.A.C. 7:26-2D.1(d)24.) (14)

RESPONSE: The Department acknowledges receipt of the comment.

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105. COMMENT: With respect to the requirements at N.J.A.C. 7:26-2D.1(d)24, see comment on N.J.A.C. 7:26-2D.1(c)2xii. at Comment 67 above. (10)

RESPONSE: A release or discharge of waste may present an environmental hazard. Therefore, N.J.A.C. 7:26-2D.1(d)24 will remain in the regulations to report a release or discharge. The regulation requires that the facility specify the type of substance discharged and the estimated quantity, the nature of the discharge, the location of the discharge, any action taken or proposed to be taken in order to mitigate the discharge, and any other information concerning the incident the Department may request at the time of notification. Based upon the information provided, appropriate action will be taken to ensure the discharge is properly managed.

106. COMMENT: The Commenters acknowledge that an on-site emergency coordinator should be designated who will be available during all hours of operation for the purpose of handling emergency situations, such as spills, discharges or releases of solid waste as required by N.J.A.C. 7:26-2D.1(d)25. (14)

RESPONSE: The Department acknowledges receipt of the comment.

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107. COMMENT: With respect to the requirements at N.J.A.C. 7:26-2D.1(d)26, see comment on N.J.A.C. 7:26-2D.1(c)2xv. at Comment 70 above. (10)

RESPONSE: While the ICCTA preempted State authority to permit solid waste transfer operations, it did not preempt the Department's ability to impose penalties for failure to operate in accordance with non-preempted regulations.

108. COMMENT: The propriety of imposing penalties upon rail carriers pursuant to the SWMA rules, N.J.A.C. 7:26-5, for failure to operate in compliance with the requirements of the proposed regulations must be determined on a case-by-case basis. Accordingly, the Commenters reserve the right to raise preemption of any purportedly applicable requirement as a defense to any action for penalties pursuant to the SWMA. (See N.J.A.C. 7:26-2D.2(d)26.) (14)

RESPONSE: Whether a rail carrier has violated a condition of the rules and the imposition of penalties for violations are determined on a case-by-case basis.

N.J.A.C. 7:26-3.

109. COMMENT: The Department's assertion that the requirement to obtain a permit to handle solid waste is preempted, but that a requirement for a permit to handle any other waste type is

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not preempted, is without any basis. (See N.J.A.C. 7:26-3.6(a)2.) (10) The Commenters specifically reserve the right to challenge any purported obligation to obtain a permit to handle hazardous waste or regulated medical waste on the grounds of preemption. (See N.J.A.C. 7:26-3.6(a)2.) (14)

RESPONSE: The comment is based upon the regulations found at N.J.A.C. 7:26-3.6 that apply to non-rail carrier solid waste intermodal container facilities (see N.J.A.C. 7:26-3.6(a)1 which expressly states that this section does not apply to rail carriers that transfer solid waste to or from rail cars). The regulation specifies that non-rail carrier facilities that manage hazardous waste or regulated medical waste may only do so if the operator complies with all applicable permitting requirements for such activities.

Summary of Agency-Initiated Changes

Upon adoption, the Department is making the following non-substantive technical and/or grammatical corrections. These change(s) correct cross-reference errors and minor typographical errors in the regulatory text or make further clarifications as follows: The Department is amending the language at N.J.A.C. 7:26-2D.1(d) by adding “at a facility owned by such rail carrier within the State of New Jersey” for consistency with the language at N.J.A.C. 7:26-2D.1(c) and the universe of regulated rail carriers.

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- The references to “Title 49 C.F.R. Part 201” at N.J.A.C. 7:26-2D.1(c)2ix and N.J.A.C. 7:26-2D.1(d)15 have been replaced with “Title 49 C.F.R. Part 210” which is the correct citation to the Federal noise emissions standards.

Summary of Changes Made in Response to Comments

In response to comments received, the Department is making the following minor substantive changes. They are explained in the responses to comments above and summarized below. They are as follows:

- The Department is amending the definition of “rail carrier” at N.J.A.C. 7:26-2.1(c)1, N.J.A.C. 7:26-2D.1(a) and N.J.A.C. 7:26H-1.6(f) to acknowledge that some rail carriers may not have been issued a “certificate or license.” The text now reads that rail carriers shall have been approved, or otherwise recognized as a rail carrier by the United States Surface Transportation Board or its predecessor agency for the reasons indicated in response to Comment 37.
- The Department is not adopting the proposed regulatory text at N.J.A.C. 7:26-2D.1(c)2vi which requires a rail carrier facility to control insects, arthropods and rodents for the reasons indicated in response to Comment 59.
- The Department is amending the regulatory text at N.J.A.C. 7:26-2D.1(c)2xii to clarify that only releases or discharges of solid waste that would harm human health and the environment must be immediately reported. See response to Comment 67.

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- The Department is not adopting the proposed exemption from the requirement at N.J.A.C. 7:26-3.2(b) of submitting a disclosure statement as a part of an approved registration statement, partially in response to comments 21 through 25 and because the Department does not believe this exemption goes far enough in light of the ICCTA. That is, the ICCTA may preempt the Department's authority to require at N.J.A.C. 7:26-3.2 that rail carriers apply for and obtain an approved registration statement (of which the disclosure statement is one part) prior to engaging in the transportation of solid waste in New Jersey. The Department is addressing this preemption in a separate proposal. (See concurrent proposal published elsewhere in this issue of the Register.)

Federal Standards Statement

Executive Order 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c. 65), require State agencies that adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards Analysis. The purpose of this rulemaking is to amend the Department's permitting regulations to exempt rail carriers operating under the jurisdiction of the STB that transfer solid waste to or from rail cars from solid waste permitting regulations. The adopted amendments and new rule will not exceed any Federal standard or requirement because they create an exemption from State regulation. Moreover, there are no Federal standards that specifically apply to solid waste transfer operations by rail carriers. Therefore, no comparison with Federal standards is required.

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Full text of the adopted amendments follow (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

CHAPTER 26

SOLID WASTE REGULATIONS

SUBCHAPTER 2. DISPOSAL

7:26-2.1 Scope and applicability

(a) - (b) (No change from proposal.)

(c) This subsection sets forth the specific criteria for exempting rail carriers:

1. This subchapter does not apply to a rail carrier that transfers containerized or non-containerized solid waste to or from rail cars. For the purpose of this subchapter, the term “rail carrier” shall mean a person as defined in 49 U.S.C. § 10102(5) that provides common carrier railroad transportation and has been ***[issued a certificate or license,]* *approved*** pursuant to 49 U.S.C. §§ 10901 or 10902, by the United States Surface Transportation Board (or its predecessor agency) ***or otherwise has been recognized as a rail carrier by such agency,*** and holds out to the general public that the operations at the facility for which the exemption under this subchapter is applicable are being conducted by it or on its behalf as part of its rail transportation services. However, a rail carrier that transfers containerized or non-containerized solid waste to or from rail cars is not exempt from regulation pursuant to the Solid Waste Management Act, and shall be subject to the provisions of N.J.A.C. 7:26-2D.

2. – 3. (No change from proposal.)

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SUBCHAPTER 2D. REQUIREMENTS ON RAIL CARRIERS THAT TRANSFER CONTAINERIZED OR NONCONTAINERIZED SOLID WASTE TO OR FROM RAILCARS

7:26-2D.1 Requirements on rail carriers that transfer containerized or noncontainerized solid waste to or from rail cars

(a) For the purpose of this subchapter, the term “rail carrier” shall mean a person as defined in 49 U.S.C. § 10102(5) that provides common carrier railroad transportation and has been *[issued a certificate or license,]* ***approved*** pursuant to 49 U.S.C. §§ 10901 or 10902, by the United States Surface Transportation Board (or its predecessor agency) ***or otherwise has been recognized as a rail carrier by such agency,*** and holds out to the general public that the operations at the facility are being conducted by it or on its behalf as part of its rail transportation services.

(b) (No change from proposal.)

(c) A rail carrier that engages in the transportation of solid waste at a facility owned by such rail carrier within the State of New Jersey exclusively in the form of sealed containers of solid waste, and that does not engage in any form of solid waste tipping (such as onto the floor of a building or other structure), processing, sorting or compaction, or the removal of solid waste from a container to transfer to another container or vehicle, shall comply with the following requirements:

1. (No change from proposal.)

2. The rail carrier shall operate in accordance with the following standards:

i. – v. (No change from proposal.)

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vi. *[The operator shall effectively control insects, other arthropods and rodents at the facility by means of a program in compliance with N.J.A.C. 7:30, and implemented by an applicator of pesticides, certified in accordance with the New Jersey Pesticide Control Code, N.J.A.C. 7:30.]*

vii.-viii **Recodify as vi and vii (No change in text).***

*[ix] **viii***. Facilities and all appurtenances, other than those owned or operated by rail carriers, including vehicles while on-site, shall be positioned and buffered in such a manner that sound levels generated by the operation shall not exceed limits established pursuant to the Noise Control rules, N.J.A.C. 7:29, and rail carriers shall at all times comply with the noise emissions standards set forth in Title 49 C.F.R. Part *[201]* ***210***, and any applicable regulation promulgated pursuant to the State Noise Control Act, N.J.S.A. 13:1G-1 et seq.

x. – xi. (No change from proposal.)

xii. Any release or discharge of any solid waste ***that would harm human health and the environment*** at the facility shall be immediately reported by the facility operator or its designee to the DEP Emergency Response 24-hour Hotline at 1-877-WARNDEP. The report shall specify the type of substance discharged and the estimated quantity, the nature of the discharge, the location of the discharge, any action being taken or proposed to be taken in order to mitigate the discharge, and any other information concerning the incident the Department may request at the time of notification;

xiii. - xv. (No change from proposal.)

(d) A rail carrier that engages in the transportation of solid waste ***at a facility owned by such rail carrier within the State of New Jersey***, and that engages in any form of solid waste tipping (such as onto the floor of a building or other structure), processing, sorting or

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compaction, or the removal of solid waste from a container to transfer to another container or vehicle, shall comply with the following requirements:

1. – 14. (No change from proposal.)

15. Facilities and all appurtenances, other than those owned or operated by rail carriers, including vehicles while on-site, shall be positioned and buffered in such a manner that sound levels generated by the operation shall not exceed limits established pursuant to the Noise Control rules, N.J.A.C.7:29, and rail carriers shall at all times comply with the noise emission standards set forth in Title 49 C.F.R., Part *[201]* ***210***, and any applicable regulation promulgated pursuant to the State Noise Control Act, N.J.S.A. 13:1G-1 et seq.

16. – 27. (No change from proposal.)

SUBCHAPTER 3. TRANSPORTATION

7:26-3.2 Registration

(a) (No change from proposal.)

(b) After July 2, 1984, any person who files an application for approval of a registration statement shall submit with the application the disclosure statement described in N.J.A.C. 7:26-16.4. The requirement of a disclosure statement shall not apply to any person specifically exempted under N.J.A.C. 7:26-*[2.1(c)2,]* 16.3(d) and/or 16.6(k), but shall apply in the case of a licensee or permittee which must file a disclosure statement for any lessor which holds a beneficial interest in the licensee or permittee pursuant to N.J.A.C 7:26-16.6(i) or (j).

(c)-(m) (No change from proposal.)

7:26-3.6 Intermodal container facility

(a)-(o) (No change from proposal.)

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CHAPTER 26H

SOLID WASTE UTILITY REGULATIONS

7:26H-1.6 Certificate of public convenience and necessity

(a) – (e) (No change from proposal.)

(f) A rail carrier as defined in 49 U.S.C. § 10102(5) that provides common carrier railroad transportation and has been *[issued a certificate or license,]* ***approved*** pursuant to 49 U.S.C. §§ 10901 or 10902, by the United States Surface Transportation Board (or its predecessor agency) ***or otherwise has been recognized as a rail carrier by such agency,*** and holds out to the general public that the operations at the facility are being conducted by it or on its behalf as part of its rail transportation services and that is engaged in the business solid waste disposal or transportation by rail, but does not engage in the business of solid waste collection (as defined by N.J.S.A. 13:13E-3) by other means of transportation within the State of New Jersey, is not subject to the provisions of this chapter.

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Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Analysis addressing the requirements of Executive Order 27 (1994) and the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., permit the public to understand accurately and plainly the purposes and expected consequences of this adoption. I hereby authorize the adoption.

Date

Bradley M. Campbell, Commissioner
Department of Environmental Protection